Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 18 | May 9, 1984 | No. 19

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Logistics Management Division, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 84-89)

Customs Regulations Amendments Relating to Toledo and Sandusky, Ohio, and Lake Charles, Louisiana

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by consolidating the ports of entry of Toledo and Sandusky, Ohio, into one port of entry, to be called Toledo-Sandusky, with its headquarters in Toledo, Ohio. This change will enable Customs to obtain more efficient use of its personnel, facilities, and resources. It will eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. Moreover, it will enable Customs to provide better and more economical service to carriers, importers, and the public.

This document also amends the Customs Regulations by transferring jurisdiction over the port of entry of Lake Charles, Louisiana, from the District Director of the Port Arthur, Texas, Customs District to the District Director of the New Orleans, Louisiana, Customs District. This action is in keeping with Customs policy of aligning its regional boundaries with state lines whenever possible and desirable. This amendment is a change in management structure only and will have no adverse effect on the services provided.

EFFECTIVE DATE: May 24, 1984.

FOR FURTHER INFORMATION CONTACT: Denise Crawford, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Service field organization presently consists of seven geographical regions further divided into districts, with ports of entry within each district. Customs ports of entry are locations (seaports, airports, or land border ports) where Customs officers are assigned to accept entries of merchandise, collect duties, clear passengers, examine baggage, and enforce the customs and related laws.

Toledo-Sandusky

In the list of Customs regions, districts, and ports of entry set forth in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), Toledo and Sandusky, Ohio, are listed as separate ports of entry in the Cleveland, Ohio, district. Toledo and Sandusky are located approximately 50 miles apart, with most of the Customs activity in the area being handled in Toledo. Because the Customs activity at Sandusky is seasonal, it is currently staffed only by a port director and one inspector, supplemented by W.A.E. (When Actually Employed) personnel. There are no import specialists, customhouse brokers, or vessel agents located in Sandusky.

After a comprehensive study of the activity at the ports of Toledo and Sandusky, Customs concluded that the most efficient and effective use of its personnel and resources would be made by formally consolidating these ports into one port, to be called Toledo-Sandusky, with its headquarters in Toledo. As explained in the notice published in the Federal Register on July 5, 1983 (48 FR 30671), which proposed this change, the consolidation will provide better and more economical manpower utilization and enhance Customs enforcement effectiveness. The only comment received in response to the notice was submitted by the Bureau of the Census of the U.S. Department of Commerce. They requested continued separate information on vessels for the two locations so that the foreign trade statistics reports which they prepare would be more complete. This comment is beyond the scope of the proposed change. Customs and Commerce will coordinate a joint resolution to this request independent of this proposal. The change will enable Customs to obtain more efficient use of its personnel, facilities and resources. The change will eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. Moreover, it will enable Customs to provide better and more economical service to carriers, importers, and the public. Accordingly, Customs has decided to proceed with the proposal as planned.

The geographical limits of the consolidated port will encompass:

> All the territory within the corporate limits of the city of Toledo and the rest of Lucas County, Ohio; all the territory within the corporate limits of the cities of Rossford and North-

wood and the townships of Lake and Perrysburg, all located in Wood County, Ohio; all the territory located between Ohio State Route 2 and Lake Erie from the southern limits of the eastern portion of Lucas County to the western corporate limits of the city of Sandusky; and all the territory within the corporate limits of the cities of Sandusky and Huron and Huron Township, all located in Erie County, Ohio

Lake Charles

In the list of Customs regions, districts, and ports of entry set forth in section 101.3(b), Customs Regulations, the port of Lake Charles, Louisiana, is listed in the Port Arthur, Texas, Customs District, in the Southwest Region. Customs believes that its regional boundaries should be aligned with state lines whenever possible and desirable. After consideration of this matter, Customs believes it is both possible and desirable to align its regional boundaries with the State of Louisiana.

Accordingly, jurisdiction over the port of Lake Charles, Louisiana, will be transferred from the District Director of the Port Arthur, Texas, Customs District, in the Southwest Region, to the District Director of the New Orleans, Louisiana, Customs District, in the South Central Region. This amendment is a change in management structure only and will have no adverse effect on the services provided to the public at the Lake Charles port of entry.

The new geographical descriptions for the two Customs Districts will read as follows:

New Orleans, Louisiana—The States of Tennessee, Arkansas, and Louisiana, and that part of the State of Mississippi lying north of latitude 31° N.

Port Arthur, Texas—That part of the State of Texas from Sabine Pass north along the State line to the north boundary line of Shelby County, west to the Neches River, down the western shore of the Neches River to the north boundary of Jefferson County, westerly along the north boundary of Jefferson County to the east boundary of Liberty County, south along the east boundary of Liberty County to the Gulf of Mexico, encompassing that portion of Chambers County between the Liberty County border extended to the Gulf of Mexico and the Chambers/Jefferson County border.

AUTHORITY

Changes to the Customs field organization are made under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949–1953 Comp., Ch. II)., and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

List of Subjects

19 CFR Part 101

Customs duties and inspection, Imports, Organization and functions (Government agencies).

Amendments to the Regulations

To reflect these changes, Part 101 Customs Regulations (19 CFR Part 101), is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. To reflect the consolidation of the Customs ports of entry of Toledo and Sandusky, Ohio, the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by removing "Sandusky, Ohio (T.D. 81-72)." and "Toledo, Ohio, including territory described in T.D. 71-157.", under the column headed "Ports of entry" in the Cleveland, Ohio, Customs District of the North Central Region, and inserting, in their place, "Toledo-Sandusky, Ohio, including the territory described in T.D. 84-89."

2. To reflect the transfer of the Customs port of entry of Lake Charles, Louisiana, from the Port Arthur, Texas, Customs District in the Southwest Region to the New Orleans, Louisiana, Customs District in the South Central Region, the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), is further amended by: (a) removing "Lake Charles, La. (E.O. 5475, Nov. 3, 1930), including territory described in T.D. 54137.", under the column headed "Ports of entry" in the Port Arthur, Texas, Customs District; (b) removing "also the parishes of Cameron and Calcasieu in the State of Louisiana.", under the column headed "Area" in the Port Arthur, Texas, Customs District; (c) removing the last ";" which appears in the description under the column headed "Area" in the Port Arthur, Texas, Customs District, and inserting a "." in its place after "Jefferson County border."; (d) inserting "Lake Charles, La., (E.O. 5475, Nov. 3, 1930), including territory described in T.D. 54137.", between "Knoxville, Tenn., including territory described in T.D. 75-128." and "Little Rock—North Little Rock, Ark., including territory described in T.D. 70-146." under the column headed "Ports of entry" in the New Orleans, Louisiana, Customs District; (e) removing "except the parishes of Cameron and Calcasieu", under the column headed "Area" in the New Orleans, Louisiana, Customs District.

Executive Order 12291

Because this document relates to the organization of the Customs Service, pursuant to section 1(a)(3) of Executive Order 12291, it is not a regulation or rule subject to that Executive Order.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to these amendments because the changes will not have a significant economic impact on a substantial number of small entities. There will be no meaningful reduction in Customs service as a result of the amendments.

Accordingly, it is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: April 6, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary.

[Published in the Federal Register, April 24, 1984 (49 FR 17444)]

---

19 CFR Part 101

(T.D. 84-90)

Change in the Customs Service Field Organization—Aberdeen, Washington

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Finel rule.

SUMMARY: The document amends the Customs Regulations to change the Customs Service field organization by extending and redefining the geographical limits of the port of entry of Aberdeen, Washington. The change extends the existing port limits to include Bowerman Field Airport, enabling Customs to provide better service to private and commercial aircraft using this airport as their port of arrival into the United States.

EFFECTIVE DATE: May 24, 1984.

FOR FURTHER INFORMATION CONTACT: Richard C. Coleman, Office of Inspection, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, on July 5, 1983, Customs published a notice in the Federal Register (48 FR 30670) proposing to amend section 101.3(b), Customs Regulations (19 CFR 101.3(b)), by extending and redefining the geographical limits of the port of entry of Aberdeen, Washington.

Prior to this proposal, T.D. 56229, published in the FEDERAL REGISTER on July 31, 1964 (29 FR 11112), extended the geographical limits of Aberdeen, Washington, to include the corporate cities of Aberdeen, Hoquiam, and Cosmopolis, in the State of Washington. By T.D. 79-169, published in the FEDERAL REGISTER on June 15, 1979 (44 FR 34478), the port of entry of South Bend-Raymond, Washington, was abolished and the existing port limits of Aberdeen were extended to include the territory previously encompassed by the port of South Bend-Raymond.

The change extends the existing port limits to include Bowerman Field Airport, enabling Customs to provide better service to private and commercial aircraft using this airport as their port of arrival into the United States. Bowerman Field Airport is only 200–300 yards outside the port limits of Aberdeen. It is a landing rights airport used mainly by private fliers and commercial private air taxis. Although Customs is entitled to be reimbursed for mileage travelled to service locations outside port limits, because Bowerman Field is so close, Customs has never charged mileage to collect the minimal amount which would be reimbursable. Some pilots question why Customs does not collect the mileage charge and Customs inspectors explain the situation. By extending the port limits of Aberdeen, Customs will technically correct the mileage charge issue. No additional costs in salary or travel will be incurred by Customs or the travelling public. The change will remedy a bothersome situation by including Bowerman Field Airport within the limits of the port of Aberdeen.

The only comment received in response to the proposal of July 5, 1983, favored the port extension, but requested that the port name be changed to Grays Harbor. Customs believes that the official port name should remain Aberdeen, as listed in the Customs Regulations and existing directories. Any benefits to the Grays Harbor community would not offset the possible confusion of a name change to the general public. Accordingly, it has been determined to adopt the change. This document amends section 101.3(b), Customs Regulations (19 CFR 101.3(b)), to change the Customs field organization by extending and redefining the geographical limits of the port of entry of Aberdeen, Washington, in the Seattle Customs district of the Pacific Region.

CHANGE IN THE CUSTOMS SERVICE FIELD ORGANIZATION

Under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449), the existing geographical limits of the port of entry of Aberdeen, Washington, are extended to include Bowerman Field Airport. Accordingly, the following territory is included within the extension of the port of Aberdeen: Sections 8 and 9, Township 17 North, Range 10 West, West Meridian, County of Grays Harbor, State of Washington. Thus, the geographical limits of the port of entry of Aberdeen, Washington, are extended and redefined to be as follows:

All of the areas within the corporate limits of the cities of Aberdeen, Hoquiam, and Cosmopolis, and the area within the limits of Bowerman Field Airport, described as sections 8 and 9, Township 17 North, Range 10 West, West Meridian, County of Grays Harbor, all in the State of Washington.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Imports, Organization.

AMENDMENT TO THE REGULATIONS

PART 101—GENERAL PROVISIONS

To reflect this change, the list of Customs regions, districts, and ports of entry in section 101.3, Customs Regulations (19 CFR 101.3), is amended by removing "T.D. 79–169." under the column headed "Ports of entry" after "Aberdeen, including territory described in" and inserting, in its place, "T.D. 84–90.", in the Seattle, Washington, Customs district of the Pacific Region.

EXECUTIVE ORDER 12291

Because this amendment relates to the organization of the Customs Service, pursuant to section 1(a)(3) of E.O. 12291, it is not subject to that Executive Order.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this amendment. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some small entities in the Aberdeen area, it is not expected to be significant because the extension

437-360 O - 84 - 2

of the limits of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was James S. Demb, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: April 6, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 24, 1984 (49 FR 17442)]

---

19 CFR Part 101

(T.D. 84-91)

Customs Regulations Amendments Relating to the Customs Field Organization

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to change the Customs Service field organization by (1) consolidating the geographical limits of the adjacent ports of Owensboro, Kentucky, and Evansville, Indiana, into a single consolidated port of Owensboro—Evansville, and (2) consolidating the geographical limits of the port of Cincinnati, Ohio, and Lawrenceburg, Indiana, into a single consolidated port of Cincinnati—Lawrenceburg. The change is part of Customs continuing program to secure the most economical use of personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

EFFECTIVE DATE: May 24, 1984.

FOR FURTHER INFORMATION CONTACT: Denise Crawford, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs published a notice in the Federal Register on September 8, 1983 (48 FR 40526), which proposed to amend section 101.3(b), Customs Regulations (19 CFR 101.3(b)), by (1) consolidating the geographical limits of the adjacent ports of Owensboro, Kentucky, and Evansville, Indiana, into a single consolidated port of Owensboro—Evansville, and (2) consolidating the geographical limits of the ports of Cincinnati, Ohio, and Lawrenceburg, Indiana, into a single consolidated port of Cincinnati—Lawrenceburg.

These consolidations are deemed necessary because of the close proximity of both sets of ports and the low volume of Customs activities being conducted. Also, because of the new warehouse procedures established by T.D. 82-204, effective December 1, 1982, responsibility has been shifted from Customs personnel to warehouse proprietors to ensure that the necessary Customs procedures are followed in operating bonded warehouses. The new warehouse procedures have allowed Customs to remove its personnel from the duty of warehouse supervision previously required at these ports. Thus, the minimal service needs at these ports coupled with the new Customs warehouse procedures would enable Customs to effect the two port consolidations without any loss in operational efficiency.

DISCUSSION OF COMMENT

The only comment received by Customs in response to the notice proposing these changes was positive but indicated there is a need for limited daily staffing at Lawrenceburg. Even though the port office would be in Cincinnati, Customs will continue to provide service at Lawrenceburg.

After consideration of the comment and further review, it has been determined advisable to adopt the amendments as proposed.

CHANGES IN THE CUSTOMS FIELD ORGANIZATION

Under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949-1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101-5 (47 FR 2449), the geographical limits of the adjacent ports of Owensboro, Kentucky, and Evansville. Indiana, are consolidated into a single port of Owensboro—Evansville, Under the same authority, the geographical limits of the ports of Cincinnati, Ohio, and Lawrenceburg, Indiana, are consolidated into a single port of

Cincinnati-Lawrenceburg. Description of the geographical limits of both consolidated ports are as follows:

Owensboro—Evansville

The limits of the consolidated port of Owensboro—Evansville are the geographical territory of the existing two ports of Owensboro, Kentucky, and Evansville, Indiana. The geographical limits of the consolidated port are as follows:

All the territory within the corporate limits of the cities of Evansville, Indiana; Henderson, Kentucky; and Owensboro, Kentucky; including that territory encompassing the Owensboro-Daviess County Airport which, on the north is bounded by Kentucky Highways 54, 56, and 81, on the west by Kentucky Highway 81, on the south by Fisher Road, on the east by Carter Road until it intersects with U.S. Bypass 60 and northwest on U.S. Bypass 60 until it meets Kentucky Highways 54, 56, and 81. In addition, the consolidated port also includes that territory located between U.S. Route 60 on the south and the Ohio River on the north from the western city limits of Owensboro, Kentucky, to the eastern city limits of Henderson, Kentucky. It also includes that territory occupied by U.S. Highway 41 proceeding from Evansville's northern corporate limits to the point where Indiana State Route 241 intersects with U.S. Highway 41.

Cincinnati—Lawrenceburg

The limits of the consolidated port of Cincinnati—Lawrenceburg are the geographical territory of the existing two ports of Cincinnati, Ohio, and Lawrenceburg, Indiana. The geographical limits of the consolidated port are as follows:

All the territory within the corporate limits of the cities of Lawrenceburg and Greendale, Indiana, and the territory bounded by a line proceeding north and east on U.S. Highway 50 from the northern corporate limits of Lawrenceburg to the junction of U.S. Highway 50 with the Great Miami River, then proceeding in a northeasterly direction along the eastern bank of the Great Miami River to the northern boundary of Hamilton County, then proceeding in an easterly direction along the northern boundary of Hamilton County to Ohio State Highway 747, then proceeding in a northerly direction in Butler County along Ohio State Highway 747 to Rialto Road, then proceeding in a generally northeasterly direction along Rialto Road to Allen Road, then proceeding in a southerly, then easterly direction on Allen Road to Cincinnati-Dayton Road, then proceeding in a southerly direction on Cincinnati-Dayton Road to the northern boundary of Hamilton County, then proceeding in an easterly direction along the northern boundary of Hamilton County to the eastern boundary of Hamilton County, then proceeding in a southerly direction along the eastern boundary of Hamilton County to the north bank of the Ohio River, then proceeding in

a westerly direction along the northern bank of the Ohio River to the bridge at Interstate Highway 275, then proceeding in a westerly direction along Interstate Highway 275 to its intersection with Kentucky State Highway 9, then proceeding in a southeasterly direction along Kentucky State Highway 9 to its intersection with Pooles Creek Road 1, then proceeding due west from that intersection to the eastern bank of the Licking River, then proceeding in a northwesterly direction along the eastern bank of the Licking River to its intersection with Interstate Highway 275, then proceeding in a westerly direction along Interstate Highway 275 to its intersection with Interstate Highway 75, then proceeding in a southerly direction along Interstate Highway 75 to its intersection with Kentucky State Highway 18, then proceeding in a northwesterly direction along Kentucky State Highway 18 to its intersection with Kentucky State Highway 237, then proceeding in a generally northerly direction along Kentucky State Highway 237 to its intersection with Interstate Highway 275, then proceeding in a westerly direction along Interstate Highway 275 to its intersection with the northern bank of the Ohio River, then proceeding in a southwesterly direction to the eastern corporate limits of Lawrenceburg, Indiana.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

Amendments to the Regulations

1. To reflect these changes, the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by removing "Owensboro, Ky., including the territory described in T.D. 80–22" and "Evansville, Ind." under the column headed "Ports of entry" in the Cleveland, Ohio, Customs District and inserting, in alphabetical order, "Owensboro, Ky.—Evansville, Ind., including the territory described in T.D. 84–91."

2. That column of section 101.3(b), is further amended by removing "Cincinnati, Ohio, including the territory described in T.D. 75–144." and "Lawrenceburg, Ind., including Greendale (E.O. 6634, March 7, 1934)." and inserting, in alphabetical order, "Cincinnati, Ohio-Lawrenceburg, Ind., including the territory described in T.D. 84–91."

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to these amendments. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-relat-

ed activity in various parts of the country. Although these changes may have a limited effect upon some small entities in the Owensboro, Kentucky; Evansville and Lawrenceburg, Indiana; and Cincinnati, Ohio; areas, they are not expected to be significant because the consolidations of Customs ports of entry in other locations have not have a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendments will not have a significant economic impact on a substantial number of small entities.

EXECUTIVE ORDER 12291

Because this rule relates to the organization of the Customs Service, it is not a regulation or rule subject to Executive Order 12291, pursuant to section 1(a)(3) of that Executive Order.

DRAFTING INFORMATION

The principal author of this document was James S. Demb, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Commissioner of Customs.

Approved: April 6, 1984.
JOHN WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 24, 1984 (49 FR 17443)]

---

19 CFR Part 171

(T.D. 84-92)

Customs Regulations Amendment Relating to Petitions for Relief From Certain Seizures

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to evidence required with petitions for relief from certain seizures. The amendment: (1) expands the regulations to cover certain situations where the petitioner was not in possession of the seized property at the time of the seizure; (2) requires certain additional evidence in petitions for relief from such seizures; and (3) gives examples of the types of evidence that will be considered in determining the relief that the petitioner is to be afforded.

These changes are necessary to make the pertinent regulation more complete, and so that petitioners cannot obscure any involvement in or knowledge of the acts or omissions which may have resulted in a violation of law.

EFFECTIVE DATE: May 25, 1984.

FOR FURTHER INFORMATION CONTACT: Harriett Blank, Miscellaneous Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5746).

SUPPLEMENTARY INFORMATION:

Background

Section 596, Tariff Act of 1930, as amended (19 U.S.C. 1595a), among other seizure provisions enforced by Customs, provides for the seizure and forfeiture of vessels, vehicles, aircraft and other conveyances used in the entry of any article into the United States contrary to law. Section 162.22(a), Customs Regulations (19 CFR 162.22(a)), similarly provides for the seizure of conveyances. Section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), provides that the Secretary of the Treasury may remit or mitigate, upon such terms and conditions as he deems reasonable and just, any fine, penalty, or forfeiture, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify remission or mitigation. Subpart B of Part 171, Customs Regulations (19 CFR Subpart B, Part 171), pertains to petitions for remission or mitigation of fines, penalties, and forfeitures. Section 171.13, Customs Regulations (19 CFR 171.13), provides that additional evidence is required with petitions for relief when: (1) the party who was responsible for or caused the act which resulted in the seizure is a party other than the petitioner; or (2) the petitioner holds a chattel mortgage or a conditional sales contract on the seized property.

As set forth in a notice of proposed rulemaking published in the Federal Register on August 17, 1983 (48 FR 37227) this amendment expands section 171.13 to: (1) cover certain other situations (long-term lease agreements, voluntary bailments and straw purchase transactions) where the petitioner was not in possession of the seized property at the time of the seizure; (2) require certain other additional evidence in petitions for relief; and (3) give examples of the types of evidence that will be considered in determining the relief that the petitioner is to be afforded.

Explanation of Changes

Specifically, several changes to section 171.13 are involved. Both subparagraphs (a) and (b) of the section, relating to the various

types of evidence the petitioner must present, have been changed from paragraph form to numbered phrases. The content however, has remained the same except for two changes. First, in subparagraph (a), relating to a situation in which the party who was responsible for or caused the act which resulted in the seizure is a party other than the petitioner, the fourth category of evidence required is deleted. That situation related to the case of a family member having an interest in property seized while in possession of another family member. The provision required evidence to be submitted that the petitioning family member did not know or have reason to know that the property was likely to be used in the act which resulted in the seizure.

In lieu of the foregoing, the amendment will require evidence that, with respect to a seized transporting conveyance, the petitioner took reasonable steps to prevent the conveyance from being used in violation of Customs laws or other laws of the United States. Second, subparagraph (b), which relates to the situation in which the petitioner holds a chattel mortgage or a conditional sales contract on the seized property, a third category of evidence will be required. The petitioner must now provide evidence that at no time did it have any knowledge or reason to believe that the owner of the beneficial interest in the property had a criminal record or general reputation for commercial crime.

The document also adds new subparagraphs (c) through (g) to section 171.13. Subparagraphs (c) through (e) cover certain other situations similar to subparagraphs (a) and (b) when the petitioner was not in possession of the seized property at the time of the seizure. These new provisions are controlled by the same additional evidence required in subparagraph (b). Specifically, subparagraph (c) relates to long-term lease agreements when a petitioner leases property on a long-term basis to another with the right to sublease and the property is later seized. Subparagraph (d) relates to voluntary bailments when a petitioner, who is not in the business of lending money secured by property or of renting property for profit, allows another to use the property without cost and the property is later seized. Subparagraph (e) relates to straw purchase transactions when a petitioner is a lienholder and a person purchases property in his own name from the petitioner for another who has a criminal record or general reputation for commercial crime and the petitioner knows or has reason to believe that the purchaser of record is not the real purchaser. Subparagraph (f) contains some examples of the types of evidence that will be considered when determining whether the petitioner is entitled to relief from the forfeiture of a seized transporting conveyance. The types of evidence listed relate to how thoroughly the petitioner investigated the individual who was in possession of the transporting conveyance when it was seized. Finally, subparagraph (g) relates to a denial of relief for the petitioner when he fails to furnish adequate

evidence as required by the foregoing provisions or when remission would be inimical to the interests of justice.

These changes are necessary to make the regulation more complete, and prevent petitioners from obscuring any involvement they may have in, or knowledge they have of, the acts or omissions which may have resulted in a violation of law.

Discussion of Comment

Only one comment was received in response to the notice of August 17, 1983. The commenter suggested that if the owner is not in possession of the conveyance at the time of a violation, the conveyance is used for *any* commercial purpose (other than as a common carrier), and the conveyance is used under circumstances which do not involve a long-term lease agreement, voluntary bailment, or straw purchase transaction, such a conveyance would not be covered by the amendment. Customs disagrees with the commenter's position and feels that such circumstances would be covered.

Accordingly, the changes are adopted as proposed.

Executive Order 12291

Because the amendment does not meet the criteria for a "major rule", as defined by section 1(b) of E.O. 12291, the regulatory impact analysis prescribed by section 3 of the E.O. is not required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this amendment because the rule will not have a significant economic impact on a substantial number of small entities. The amendment is not expected to have significant secondary or incidental effects on a substantial number of small entities, or to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document was James S. Demb, Regulations Control Branch, Office of Regulations and Rulings (202-566-8237). However, personnel from other Customs offices participated in its development.

437-360 O - 84 - 3

LIST OF SUBJECTS IN 19 CFR PART 171

Customs duties and inspection, imports, administrative practice and procedure, law enforcement, penalties, seizures and forfeitures.

AMENDMENTS TO THE REGULATIONS

Part 171, Customs Regulations (19 CFR Part 171), is amended as set forth below.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 6, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 25, 1984 (49 FR 17754)]

PART 171—FINES, PENALTIES, AND FORFEITURES

§ 171.13 Customs Regulations (19 CFR 171.13), is revised to read as follows:

§ 171.13 Additional evidence required with certain petitions.

(a) *Seized property in possession of another responsible for act.* If the seized property was in the possession of another who was responsible for or caused the act which resulted in the seizure, the petitioner shall present the following evidence, as applicable:

(1) Evidence as to the manner in which the property came into the possession of such other person;

(2) Evidence that before parting with the property the petitioner did not know, or have reasonable cause to believe, that the property would be used to violate customs laws or other laws of the United States;

(3) Evidence that the petitioner did not know, or have reasonable cause to believe, that the violator had a criminal record or general reputation for commercial crime; and

(4) Evidence that, with respect to a seized transporting conveyance, the petitioner took reasonable steps to prevent the conveyance from being used in violation of the customs laws or other laws of the United States.

(b) *Petitioner holding chattel mortgage or conditional sales contract.* A petitioner holding a chattel mortgage or conditional sales contract covering the seized property shall submit with his petition evidence showing that:

(1) He has an interest in such property, as owner or otherwise, which he acquired in good faith;

(2) He had at no time any knowledge or reason to believe that the property was being or would be used in violation of the customs laws or other laws of the United States; and

(3) He had at no time any knowledge or reason to believe that the owner of the beneficial interest in the property had a criminal record or general reputation for commercial crime.

(c) *Long-term lease agreements.* A lessor who leases property on a long-term basis with the right to sublease shall submit with his petition evidence in accordance with paragraph (b) of this section.

(d) *Voluntary bailments.* A petitioner who allows another to use his property without cost and who is not in the business of lending money secured by property or of renting property for profit, shall submit with his petition evidence in accordance with paragraph (b) of this section. Property belonging to one family member which is seized from another is property subject to a voluntary bailment within the meaning of this subsection.

(e) *Straw purchase transactions.* If a person purchases in his own name property for another who has a criminal record or general reputation for commercial crime, and if a lienholder knows or has reason to believe that the purchaser of record is not the real purchaser, the lienholder shall submit with his petition evidence in accordance with paragraph (b) of this section as to both the purchaser of record and the real purchaser.

(f) *Evidence to be considered in determining extent of mitigation with respect to transporting conveyances.* Listed below are some examples of the types of evidence that will be considered in determining whether the petition is entitled to relief from the forfeiture of a seized transporting conveyance. This list is not all-inclusive; Customs officers may consider other similar types of evidence in making their determination.

(1) Whether the petitioner asked the person taking possession of the property whether he had a criminal record;

(2) Whether the petitioner asked for and was provided with business or financial references;

(3) Whether the petitioner asked for and was provided with personal references;

(4) Whether the petitioner contacted the references to confirm the reliability and good reputation of such person;

(5) Whether an agreement was reached between the petitioner and the person taking possession that the property would be used only in accordance with law; and

(6) Whether the petitioner contacted Federal, State or local law enforcement authorities as to the criminal record or reputation of the person taking possession. Information from a Federal law enforcement agency may require a waiver of the Privacy Act from the person who is the subject of the request.

(g) *Denial of relief.* The failure to furnish adequate evidence as required by this section may be a basis for denial of relief. Relief may also be denied to a petitioner who has met the applicable criteria, but with respect to whom remission would be inimical to the interests of justice.

(R.S. 251, as amended, sec. 618, 46 Stat. 757, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1618, 1624))

19 CFR Parts 111, 141

(T.D. 84-93)

Customs Regulations Amendments Concerning Powers of Attorney

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to powers of attorney. The document: (1) eliminates the requirement that powers of attorney required for resident corporations be supported by a certificate showing the authority of the person who executed the power of attorney; (2) reduces the documentation required in support of powers of attorney executed by nonresident corporations; (3) eliminates the requirement that powers of attorney for sealed documents be under seal; and (4) changes several sections of the regulations to conform with a section which states that powers of attorney for customhouse brokers are not required to be filed with the district director of Customs.

EFFECTIVE DATE: May 25, 1984.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Entry, Licensing and Restricted Merchandise Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

Background

A power of attorney (a legal instrument authorizing another to act as one's agent or attorney) may be executed for the transaction by an agent or attorney of a specified part or all of the Customs business of the principal. Sections 141.31 through 141.46, Customs Regulations (19 CFR 141.31-141.46), pertain to powers of attorney. The power of attorney may be executed on Customs Form 5291, or as otherwise provided in section 141.32, Customs Regulations.

Customs has reviewed its regulations relating to powers of attorney, and has concluded that certain requirements may be eliminated or simplified. A notice, which was published in the Federal Register on March 22, 1983 (48 FR 11955), proposed to amend the Customs Regulations by: (1) eliminating the requirement that powers of attorney required for resident corporations be supported by a certificate showing the authority of the person who executed the power of attorney; (2) reducing the documentation required in sup-

port of powers of attorney executed by nonresident corporations; (3) eliminating the requirement that powers of attorney for sealed documents be under seal; and (4) amending several sections of the regulations to conform with a section which states that powers of attorney for customhouse brokers are not required to be filed with the district director of Customs.

Discussion of Comments

In response to the notice, Customs received nine comments, most of which supported the proposed changes.

Two commenters recommend that section 141.37 be eliminated entirely since it requires information which is unnecessary and which creates an impediment to obtaining powers of attorney from nonresident corporations. One commenter suggests the addition of a sentence to section 141.37 in order to intermesh section 141.37 with section 141.18. Customs agrees that the requirement of proposed section 141.37(a) is unnecessary and amended section 141.37 does not include that requirement. Amended section 141.37 contains the requirement of proposed 141.37(b) that a power of attorney executed by a nonresident corporation shall be supported by documentation establishing the authority of the grantor to execute such a power of attorney on behalf of the corporation, but that requirement will only be operative when the nonresident corporation has not qualified to conduct business under state law in the state in which Customs district the agent is empowered to act.

One commenter believes that the requirement of a certificate of authority in section 141.38 should be retained. He believes that it is inconsistent to eliminate such a requirement in section 141.38, and to keep the requirements of section 113.34(c) and (d), Customs Regulations (19 CFR 113.34(c), (d)), relating to the execution of bonds. Customs believes that the requirement of a certificate of authority in section 141.38 is unnecessary, and, as was proposed, that requirement is eliminated. The notice did not pertain to section 113.34; Customs is considering changes to section 113.34(c) and (d) in another regulatory project.

The same commenter recommends against the adoption of proposed section 111.3(b)(1), Customs Regulations, which provides that a broker is not required to file with Customs a power of attorney authorizing the broker's employee to sign Customs documents on his behalf. The commenter states that this change would work to the detriment of Customs operation. Customs disagrees that the proposal would adversely effect its operation. In fact, Customs believes that its goals of administration and facilitation are better served by adoption of the proposal.

One commenter states that section 141.34 should be amended to provide that powers of attorney for partnerships may be granted for an indefinite period, rather than a maximum of two years. Customs disagrees. The two-year limit is necessary for partnerships be-

cause by their very nature, they may be easily dissolved under certain circumstances.

One commenter suggests that section 141.35 be amended to provide that it is not necessary for a principal to notify Customs of the revocation of a power of attorney granted to a broker. Customs disagrees. The better policy is to have the district directors notified of the revocation of all powers of attorney.

Two commenters address the Customs Form 5291 used for the power of attorney, as referenced in section 141.32. One of those commenters suggests a simpler format for powers of attorney; the second commenter suggests that section 141.32 be amended to provide that a power of attorney may include additional authority to that stated on the Customs Form 5291. As the proposal did not specifically address this matter, Customs has decided to proceed with the amendments proposed in the notice and to take the matter of the form and section 141.32 under further study. If it is determined that the form should be revised or that additional amendments are needed, another notice will be published in the Federal Register.

EXECUTIVE ORDER 12291

Because this document will not result in regulations which will be "major rules" as defined in section 1(b) of E.O. 12291, a regulatory impact analysis as prescribed by section 3 of the E.O. is not required.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to these regulations, because they will not have a significant economic impact on a substantial number of small entities. The regulations are not expected to have significant secondary or incidental effects on a substantial number of small entities, or to impose or otherwise cause a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the regulations will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was Gerard J. O'Brien, Jr., Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Imports.

19 CFR Part 141

Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

Parts 111 and 141, Customs Regulations (19 CFR Parts 111 and 141), are amended as set forth below.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 6, 1984.

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 25, 1984 (49 FR 17753)]

PART 111—CUSTOMHOUSE BROKERS

§ 111.3(b)(1) is revised to read as follows:

§ 111.3 Transactions for which license is not required.

* * * * * * *

(b) *As employee of brokers.* An employee of a broker, acting solely for his employer, is not required to be licensed where:

(1) *Authorized to sign Customs documents.* The broker has authorized the employee to sign Customs documents on his behalf, and has executed a power of attorney for that purpose. The broker is not required to file the power of attorney with the district director, but shall provide proof of its existence to Customs upon request. Only employees who are residents of the United States may be authorized to sign Customs documents; or

* * * * * * *

(R.S. 251, as amended, sec. 484, 46 Stat. 722, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1484, 1624))

PART 141—ENTRY OF MERCHANDISE

1. § 141.31 is amended by removing paragraph (b).
2. § 141.34 is revised to read as follows:

§ 141.34 Duration of power of attorney.

Powers of attorney issued by a partnership shall be limited to a period not to exceed 2 years from the date of execution. All other powers of attorney may be granted for an unlimited period.

3. § 141.36 is amended by removing the word "filed" and inserting in its place the word "executed".

4. § 141.37 is revised to read as follows:

§ 141.37 Additional requirements for nonresident corporations.

If a nonresident corporation has not qualified to conduct business under state law in the state in which Customs district the agent is empowered to perform the delegated authority, the power of attorney shall be supported by documentation establishing the authority of the grantor designated to execute the power of attorney on behalf of the corporation.

5. § 141.38 is revised to read as follows:

§ 141.38 Resident corporations.

A power of attorney shall not be required if the person signing Customs documents on behalf of a resident corporation is known to the district director to be the president, vice president, treasurer, or secretary of the corporation. When a power of attorney is required for a resident corporation, it shall be executed by a person duly authorized to do so.

6. § 141.39(a) is revised to read as follows:

§ 141.39 Partnerships.

(a) *General.* A power of attorney granted by a partnership shall state the names of all members of the partnership. One member of a partnership may execute a power of attorney in the name of the partnership for the transaction of all of its Customs business.

* * * * * * *

(R.S. 251, as amended, sec. 484, 46 Stat. 722, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1484, 1624))

(T.D. 84–94)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety

was different, the information is shown in a footnote at the end of the list.

Dated: April 18, 1984.

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
Pan American World Airways, Inc. (a NY Corp.), 200 Park Ave., New York, NY; Continental Casualty Co. The foregoing principal has been designated as a carrier of bonded merchandise.	Mar. 10, 1984	Mar. 27, 1984	New York Seaport $300,000

BON-3-01
216841

EDWARD B. GABLE, JR.,
Director,
Carriers, Drawback and Bonds Division.

(T.D. 84-95)

Drawback Procedure-Use of Duty-Free or Domestic Merchandise Under 19 U.S.C. 1313(b)

The administrative provision regarding mandatory use of duty-free or domestic merchandise under 19 U.S.C. 1313(b), formerly found in section 22.5(a)(5), Customs Regulations (19 CFR 22.5(a)(5)), was eliminated from both the proposed revision of the drawback regulations published in the Federal Register on August 26, 1982 (see Proposed Custs. Reg. 191.32, 47 F.R. 37574, Vol. 16 Customs Bulletin No. 35, September 1, 1982), and, ultimately, from the final revision thereof published in the Federal Register on October 14, 1983 (see section 191.32, Customs Regulations T.D. 83-212, 48 F.R. 46759, Vol. 17 Customs Bulletin No. 43, October 26, 1983).

In this regard, the mandatory use of duty-free or domestic merchandise under section 1313(b) is no longer required because it is viewed as contradicting the underlying intent of the law.

The former administrative requirement had its origin in a strict grammatical interpretation of the statute (see Bureau memorandum dated May 23, 1930, to Commissioner of Customs from Mr. Corkhill, wherein it was stated that even the then head of the English Department at the University of Maryland had been consulted concerning the correct grammatical interpretation of the statute). In accordance with this interpretation, the requirement in question was initially imposed by administrative ruling (see, e.g., Bureau letter dated August 8, 1931, to Supervising Customs Agent, New

York) and was specifically included in the Customs Regulations in August 1936 (T.D. 48490).

However, in order to fathom completely the meaning to be ascribed to an Act of Congress, it is necessary to consider everything from which aid can be derived (see *United States vs. Fisher,* 2 Cranch 358, at 386 (1805)). This being the case, no matter how plain and unmistakable the meaning of the words of the statute may appear upon superficial examination, if extrinsic aid in construing their meaning is available, there can be no rule of law which forbids its use (see *United States vs. American Trucking Associations,* 310 U.S. 534 (1940); accord, *United States vs. Dickerson,* 310 U.S. 554 (1940)). "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words" (*Dickerson,* supra, at 562).

Fundamentally, the main purpose of section 1313(b) is to relieve the claimant of the necessity in section 1313(a) of specifically identifying the imported merchandise designated for drawback, as actually having been used in the particular article that is exported (see Bureau memorandum, dated December 12, 1935 re: redesignation). Accordingly, in lieu of the specific identification requirement of section 1313(a), section 1313(b) institutes the requirement of same kind and quality.

As a result, under section 1313(b), any merchandise which is duty-free, domestic or duty-paid may be used in manufacturing or producing exported articles on which drawback is claimed, provided only that such merchandise be of the same kind and quality as the particular duty-paid merchandise which forms the basis of the claim (see Bureau letter dated June 9, 1931, to Supervising Customs Agent, San Francisco).

Therefore, in consideration of the foregoing and in accordance with the legislative history of the statute, the intent of section 1313(b) quite logically is not to compel but merely "*to permit* the substitution of duty-free or domestic [merchandise] for imported merchandise of the same kind and quality" in producing exported articles with drawback (emphasis added) (Senate Report No. 37, 71st Congress, 1st session, p. 62; and see P.L. 85–673, Senate Report No. 2165, August 4, 1958). Hence, with respect to the use of duty-free or domestic merchandise thereunder, the statute is merely permissive in nature, and not mandatory.

Furthermore, in this context, the overall design of the statute is to reduce and simplify drawback inventory and accounting procedures. Needlessly requiring the use of duty-free or domestic merchandise thereunder, on the other hand, only adds to and complicates such procedures.

Notably, the master rule in the consideration of all statutes is to so interpret them as to carry out the legislative intent. "The intent of the law is the law" (*Fenton Co. v. United States,* 14 CCA 277, at

279 (1926)). If, based upon a consideration of the language of the statute, its context, legislative history, logic and other surrounding circumstances, it appears that a literal interpretation of the statute would produce a result contrary to the apparent legislative intent, then the letter of the statute must yield and the legislative intent be carried out (see *Proctor and Gamble Manufacturing Company vs. United States,* 19 CCPA 415, cert. den. 287 U.S. 629 (1932), and cases cited therein; *Mount Washington Tanker Company vs. United States,* 505 F. Supp. 209 (U.S.C.I.T. 1980), aff'd 665 F. 2d 340 (U.S.C.C.P.A. 1981)).

Consequently, as noted above, the administrative provision regarding the mandatory use of duty-free or domestic merchandise under section 1313(b) has been abrogated inasmuch as it contravenes the legislative intent of the statute. With the elimination of this administrative requirement, it is, of course, no longer necessary to apply C.S.D. 82–111 under section 1313(b), which permitted a manufacturer or producer to satisfy this former requirement by identifying a lot of imported, duty-paid merchandise as domestic (see T.D. 83–212, 48 F.R. 46743, Vol. 17 Customs Bulletin No. 43, October 26, 1983, at 8).

Dated: April 20, 1984.

GEORGE C. STEUART
(For Edward B. Gable, Jr., Director, Carriers, Drawback and Bonds Division).

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., April 18, 1984.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

JOHN P. SIMPSON,
Director,
Office of Regulations and Rulings.

(C.S.D. 84-32)

This ruling holds that certain articulated toy figures of soldiers are classified as dolls in item 737.24, Tariff Schedules of the United States.

Date: January 26, 1983
File: CLA-2 CO:R:CV:G
070026 JCH

To: Area Director of Customs, New York, New York 10048.
From: Director, Classification and Value Division.
Subject: Request for Internal Advice No. 82/82 Concerning the Tariff Classification of GI Joe Action Figure Dolls Made In Hong Kong (Your Memorandum of May 10, 1982, CLA-02-7:S:C:D3:31-60).

This internal advice request was initiated by counsel for the importer in a letter dated April 7, 1982. A further brief was filed on July 27, 1982, followed by an additional submission on July 29, 1982, made after a conference was conducted on July 14, 1982. Our decision follows:

Issue: It is your position that the merchandise is properly classifiable under the provision for dolls in item 737.24, Tariff Schedules of the United States (TSUS). The 1982 column 1 rate of duty required under that provision was 15.4 percent ad valorem. It is claimed the merchandise is properly classifiable under the provision for toy figures of animate objects in item 737.40, TSUS, as in effect in 1982. Merchandise from Hong Kong was eligible for an ex-

emption from duty under that provision under the Generalized System of Preferences during 1982.

Facts: The merchandise consists of various toy figures which are part of a set depicting American soldiers in various roles, such as a bazooka soldier, infantry trooper, communications officer, machine gunner, etc. They are made of plastic with nine articulations. The articulations are made of adjustable mechanical connections using metal parts, and the figures are held together by an internal elastic band. Accordingly, the figures can be posed in an endless variety of positions for use in placing them and other toys similarly scaled, such as toy tanks, guns, etc., designed for complementary ensembles, in play situations depicting real life battle environments. The figures conform to a standard scale adopted for this kind of merchandise resulting in a general length for the figures of 3¾ inches.

The clothing and other features of the articles are molded into the plastic components, and the articles do not contain any exterior textile components. The packages they come in contain separate helmets, guns and other toys. Various copies of articles in trade publications have been submitted showing that these figures are consistently referred to as "action figures" while the same publications refer to toys for girls as dolls. A nationally distributed comic book has adopted a GI Joe story theme.

Law and analysis: Counsel asserts that a practice to exclude toy soldiers from the provision for dolls has existed at least since a letter dated May 25, 1931, a copy of which it is claimed we would not release in response to an FOIA request. However, the exclusion of 1¼ plastic cowboys from the provision for dolls, in T.D. 56124(113), 99 Treas. Dec. 171 (1964), and the similar tariff treatment given a metal walking spaceman with a built-in gun in T.D. 68–29(15), 2 Cust. Bull. 60 (1968), are claimed to be natural sequels to this policy. Counsel also relies on a ruling issued by the Commissioner of Customs, Region II, dated January 21, 1981, file No. 800002, in which toy racing car drivers were not considered dolls, and on our decision of September 16, 1980, file No. 064721, in which we also excluded a cowboy "action figure" from classification as a doll because it did not have a specific identity. However, in that same decision we classified a companion figure as a doll because it did have a specific identity. Counsel also refers to a letter from the District Director of Customs, Seattle, Washington, dated June 20, 1978, file reference CLA–2–07:D:CV:DA, in which "action figures" were said to be of the same class or kind of articles as toy soldiers and, in accordance with the rule in T.D. 56124(113), *supra,* were not classifiable as dolls. However, in our decision of July 11, 1979, CSD 79–501, file No. 055257, we classified the *Star Wars* figure Darth Vader as a doll, and in our decision of July 1, 1981, CSD 81–236, file No. 065735, we further indicated other similarly sized figures of humans, as opposed to figures which are merely hu-

manoid and figures with anatomical features such as wings which are incompatible with human life forms, would continue to be regarded as dolls.

The courts have dealt with what constitutes a doll at various times, but the pre-TSUS decisions often involved the underlying distinction between toys and other articles on the basis of whether they were for the amusement of children or adults. Nevertheless, the decisions are, for the most part, supportive of a broad interpretation of what constitutes a doll. By the time of *American Customs Brokerage Co. v. United States,* 60 Cust. Ct. 23, C.D. 3246 (1968), the court had little trouble in finding that the term "doll" as used in pre-TSUS tariff descriptions was broad enough to even include novelty items. And of course, by that time Headnote 2, Subpart E, Part 5, Schedule 7, TSUS, made it clear that the provisions for dolls and other toys included articles whether for the amusement of children or adults. See also *Russ Berrie & Co. v. United States,* 76 Cust. Ct. 218, C.D. 4659 (1976), cited by counsel, for an informative discussion of the old cases and lexicographic references supporting a broad interpretation of the term "doll."

However, the instant merchandise clearly constitutes playthings for children and its classification clearly does not involve some of the main considerations the court struggled with in the past in decisions such as *M. Pressner & Co. v. United States,* 24 Cust. Ct. 77, C.D. 1211 (1950), and *S. S. Kresge Co. v. United States,* 25 Cust. Ct. 89, C.D. 1269 (1950). These decisions, therefore, provide little guidance with respect to the instant matter. However, among the more cogent of counsel's citations is *Janex Corp. v. United States,* 80 Cust. Ct. 146, C.D. 4748 (1978), in which the court looked to marketing and advertising methods to determine whether a combination article was a doll. But exploration of this evidence in that matter was to some extent superfluous merely buttressing a classification which otherwise was controlled by a classic application of the "more than" rule. That case, however, is pertinent to counsel's principal suggestion that the rule of construction under which the instant classification problem must ultimately be resolved is the doctrine of commercial designation.

Commercial designation is an old and important doctrine of construction which holds that tariff descriptions are stated in the language in general use in the wholesale trade. *Goat and Sheepskin Import Co. v. United States,* 5 Ct. Cust. Appl's 178, T.D. 34254 (1914). While we frequently apply this principle where it is applicable, it no longer has the universality of application it once had and may not be pertinent at all in the instant matter. In the TSUS, "emphasis is placed on the development and use of objective standards for making product designations, and dependency on commercial designation has been considerably reduced." *Tariff Classification Study, Explanatory Materials,* CIE 1/64, p. 16. The tariff term "doll" is a simple basic word designating articles common to all

cultures at all times, and we see little reason for regarding it as other than an objective designation leaving little room for extension or limitation on the basis of either preemption of that term or deliberate avoidance of that term, as in the instant matter, in the trade usages of a particular industy. There is also the question whether a commercial usage, such as the phrase "action figure" shown by counsel to be used in trade literature describing the instant merchandise, can be allowed to control classification if that description is merely a euphenism catering to lingering taboos in our society against deviations from traditional role playing in children's games.

Even where commercial designation remains a viable rule of construction, it is primarily a rule for bringing articles within a tariff description "[w]here words used in the tariff acts to designate particular kinds or classes of goods have a well-known significance in the trade or commerce which differ from the common meaning." *Florsheim Shoe Co. v. United States,* 84 Cust. Ct. 1, 5, C.D. 4835 (1980). The absence of the use of a tariff description in trade usages is not sufficient for avoiding a tariff term and the dictionary definitions defining that term. *United States v. E. Besler & Company,* 64 CCPA 121, C.A.D. 1193 (1977). In that case, articles merchandised as optical printers and in no context whatsoever ever referred to as cameras were nevertheless held to be within the dictionary definition for cameras and, therefore, within the applicable tariff provision for cameras.

Accordingly, commercial designation is ordinarily not a rule used to exclude merchandise from a tariff description. If it were to be so used, it would seem that it would have to be shown that the tariff term and the trade usage were antonymous, contradictory or otherwise mutually exclusive. Where the trade term is synonymous with the tariff term, generic of it, or a subcategory of the term, the doctrine of commercial designation would probably not be controlling. We can discern no basis for finding that the phrase "action figure" is incompatible with the term "doll." In fact, the similar tariff phrase "animate objects" in the heading to items 737.28, TSUS, *et seq.,* clearly would include dolls, and dolls, therefore, are parenthetically excepted from that description. If describing merchandise as optical printers is not sufficient for avoiding the common meaning for the term "camera," as shown in *E. Besler, supra,* we believe that there is even less reason for considering the phrase "action figure" as a basis for avoiding the common meaning of the term "doll." Further, while the term "tin soldier" is defined in dictionaries in a manner in which a tin soldier could be construed as a different article than a doll, the term "action figure" is a phrase with no special meaning currently recognized by dictionaries. Therefore, there is a further question whether a phrase can be claimed to be a controlling commercial designation when that phrase is not recognized by any dictionary or technical encyclope-

dia as a term with special meaning attaching to the words other than the ordinary meaning of the words when used as a phrase. The ultimate issue in this matter, then, is whether the instant merchandise is within the common meaning of "doll."

With respect to this issue, part and parcel of counsel's contentions is that the merchandise is not within the common meaning of the term "doll" because it is of the same class or kind of merchandise as toy soldiers and similar articles which we have previously not regarded as dolls. While counsel has cited various secondary authorities and provided numerous exhibits, these merely reinforce the correctness of the Customs Service's previous treatment of toy soldiers as not dolls, and do not resolve the question as to whether the instant articles should be similarly treated. To answer this question we believe it is pertinent to inquire into the reasons why the traditional types of toy-soldiers have not been regarded as dolls and to determine whether those considerations are pertinent to the instant merchandise.

Of course, the underlying premise which is relied on, if not specifically asserted, is that toy soldiers are not dolls because boys play with them rather than girls. However, there is little, if anything, in the various dictionaries, encyclopedias and other secondary authorities that we have consulted that we can find supporting an interpretation of the TSUS which would attribute to the Congress an intention that parents of little girls pay more for their toys than parents of little boys for similar toys merely because the toy for one depicts a baby, dancer, or fashion model while the other depicts a soldier or cowboy. If this is the underlying legislative intent counsel suggests we should perceive and find as controlling in this matter by citing *Nootka Packing Co. v. United States,* 22 CCPA 464, T.D. 47464 (1935), we would rather expect it is an intent a contemporary legislator would quickly disavow. Nor is there anything in the court decisions supporting any such discrimination, and, in fact, we note the numerous references in the court decisions to dolls as articles for the "amusement of children" with no references to them as articles for the amusement of girls. There is, however, the definition in *Collier's Encyclopedia* (1980 ed.) which states a doll is "a plaything usually in the form of a baby or child cherished by small girls." We also note the statement in the *Funk & Wagnalls New Standard Dictionary* (1963 ed.) which, in defining a doll as a "puppet representing a person," further notes a doll is used "especially by girls." These definitions, however, do not limit dolls to girls' playthings, and similar references to dolls as girls' playthings are absent from other lexicographic authorities such as the *New Columbia Encyclopedia* (1967 ed.), *Academic American Encyclopedia* (1981 ed.), *Encyclopedia Americana* (1981 ed.), etc. Accordingly, we do not find that the common meaning of the term "doll" as shown in dictionaries and encyclopedias supports the narrow meaning advocated by counsel. Nor do we find that these

authorities would support an exception for the term "doll" from the principle that an *eo nomine* tariff description includes all forms of the article. *Nootka Packing Co. v. United States, supra.*

Nor can we find any basis in the various references we have consulted for making a distinction between toy soldiers and dolls because one is used for war games while the other is not, because one is in miniature, because one has hair or textile components, because one has a specific human protoype, because one is used in conjunction with complementary toy figures or with toy tanks, or because one depicts a figure which subsequently becomes the subject of a story in a nationally distributed comic book. In fact, soldier dolls are included in *The Doll Book* by Estelle Ansley Worrel (1966), pp. 27 and 28. Also, it is our understanding it is conceded that the larger GI Joe progenitor of the instant article which is no longer being sold would have been classifiable as a doll if imported, even though there was a similar disinclination to market that figure as a doll or otherwise describe it as such in the trade literature.

Therefore, whether or not a toy soldier is a doll must be based on other considerations. We think it is inevitable to conclude that paramount among those considerations is whether or not the article is articulated. However, we caution against the conclusion that the absence or presence of articulations should be regarded as the single distinguishing factor in all circumstances, or that all articulated figures are dolls. We continue to affirm the doctrine previously propounded that the classification of articles as dolls depends on the circumstances in each individual case. However, when articulations are present, that feature is more often than not the distinguishing feature when viewed against the background of the various definitions which tend to define toy soldiers as figurines or statuettes and dolls as puppets. While the term "figurine" may occasionally be used to mean a doll, that term when applied to toy soldiers is used in the sense of articles carved or cast in inflexible materials. A typical description of the traditional toy soldier is as follows in *Lead Soldiers and Figurines* by Marcel Baldet (1961), p. 1:

> Why say "figurine" and not simply "lead soldier," as in the good old days? * * * [T]he term "figurine" fortunately is applicable to all small figures representing personages in costumes of various ages, civilian as well as military, and without distinction as to the materials from which they are made.

Toy soldiers which are collectables are often referred to as model soldiers. These articles, whether exemplars of the famous German and English manufacturers, or of wood carvings by individual craftsmen, are all typically unarticulated statuettes with bases and depict specific uniforms colorfully painted. While counsel has cited a description in an autobiography by H. G. Wells of a toy soldier with rotating arms, we have found no other references to articulat-

ed toy soldiers in the numerous authorities and references we have consulted. We, therefore, are of the opinion that the article described by Mr. Wells was an exceptional toy the features of which cannot be considered as typical of toy soldiers and cannot be presupposed as an article included as the subject of any previous legal determinations or classifications covering toy soldiers. By contrast, the typical doll is articulated in some fashion, if merely as a result of the flexibility of the materials used in its construction, and is not an article to which the term figurine or statuette would ordinarily be applied.

An examination of the lexicographic authorities further establishes that articulations are one of the main features distinguishing dolls from other figures of human beings. A typical definition is, "[A] toy puppet representing a child or other human being." *The American College Dictionary* (1970 ed.) Again, the *Funk & Wagnalls* definition noted *supra* is of particular interest in depicting a doll as a puppet. We also note material quoted by counsel from *S. S. Kresge Co. v. United States, supra,* at 93, where the court used the term "child's puppet" interchangeably with the term "doll." Taking all of the authorities into consideration in the aggregate, we believe it must be concluded that there is a hierarchy of terms: a doll is an articulated figure, a puppet is an articulated figure used in shows, and a marionette is an articulated figure used in shows and operated by strings.

We would agree, however, that a statuette-like article on a base, such as a traditional toy soldier, is not within the definition for dolls as that term is used in the TSUS. But the toy soldiers in question have little in common with the traditional toy soldiers which are not regarded as dolls. They are not only articulated, but have nine articulations which exceed in number and in sophistication those in many articles for which we are sure there would be no argument that they are dolls or puppets. While uniforms are depicted to some extent in the instant articles, they do not emphasize ceremonial prototypes, and are for role identification rather than for ornamental or decorative purposes. Also, the instant articles do not have bases for placing them in upright positions. While the instant merchandise is of small figures, the size standard used is larger than the standard used by the famous manufacturers of the classic versions of toy soldiers. For example, previous articles we ruled on were only 1¼ inches in height. But the main distinction is that if you enlarged the instant articles, you would have articles for which the characterization as dolls would obviously be more difficult to counter. However, if you enlarged a traditional toy soldier, you still would have nothing more than an article which would be clearly a statuette.

The notation in the *Explanatory Notes to the Brussels Nomenclature* (now the *Customs Cooperation Council Nomenclature)* showing that "toy metal soldiers and the like" are excluded from the Brus-

sels provisions for dolls in par. 97.02 has been cited by counsel. It is not shown, however, that articulated plastic articles of the type at issue would be similarly excluded under that provision. Counsel has also cited authority where dictionary definitions were not applied. The point was more colorfully expressed in authorities cited in *Border Brokerage Company v. United States,* 58 Cust. Ct. 228, 239, C.D. 2947 (1967) where it was pointed out that you cannot "make a fortress out of the dictionary," and more recently in *House of Ideas, Inc. v. United States,* Slip Op. 81-74 (Ct. of Int'l Trade, decided August 11, 1981), in which the court stated there "need not be a slavish or automatic deference to what lexicographical authorities define as dolls." However, in these types of cases, this type of view is expressed to exclude from a tariff item articles which are not actually within the dictionary definition anyhow, or where there are circumstances showing the full dictionary definition, or all of the dictionary meanings of a term, etc., were not intended to be included within the tariff term when considered against the background of other considerations. Nothing has been shown in this matter indicating that the instant merchandise is not covered by the dictionary term or that the Congress did not intent this type of merchandise to be covered by the tariff term in question.

Counsel has also cited various precedents where the tariff provision for dolls was not in issue because the merchandise was of metal or for some other reason. These cases do not constitute authority for excluding the instant merchandise from the doll provisions and it is unnecessary to discuss them further.

Finally, counsel has given attention to reasons why the merchandise should not be regarded as dolls under the rationale expressed in our decision of September 16, 1980, *supra,* which held articles that did not have a specific identity would not be regarded as dolls. That position, as indicated above, is unsustainable and must be revoked. Therefore, it is unnecessary to further discuss this aspect of counsel's presentation.

To the extent that classification positions which have been expressed by field organizations before CSD 81-236, *supra,* have been clarified by that decision, they should be considered clarified by this decision and classifications made accordingly.

Holdings: 1. No change will be made in our decision classifying spacemen with built-in guns in T.D. 68-29(15), *supra,* as it is not shown that decision is necessarily inconsistent with later Customs decisions, or otherwise shown to involve errors which would sustain a change of practice.

2. The Area Director of Customs, Region 11, is instructed to review the file for the ruling dated January 21, 1982, *supra,* to determine whether that ruling is consistent with the views expressed herein, and if not the merchandise should be reclassified in accordance with this decision, the recipient of that decision notified to

that effect, and notified that reclassification would be effective as to merchandise entered after the date of the notice.

3. Our ruling of September 16, 1980, *supra,* is revoked, and classification of all of the merchandise which was the subject of that ruling entered, or withdrawn from warehouse for consumption, after the date of notification to the applicant for that ruling of this decision, will be classified as dolls in accordance with this decision.

4. Toy figures of articulated figures marketed as GI Joe figures and all similar merchandise are classifiable as dolls in item 737.24. Articles such as helmets enclosed with the articles which may be considered as garments will be classifiable as entireties with the articles. Other articles in the packages which may not be so regarded are separately classifiable as toys, not specially provided for, in item 737.95, TSUS, when that classification is applicable.

A copy of this decision should be made available to the internal advice applicant.

(C.S.D. 83-33)

This ruling holds that the imported dolls, resembling monkeys, would be prohibited entry into the United States as infringing on the rights of the copyright owner, Mattel, Inc., which has recorded their copyright registration for "Monchhichi No. 2 (opened eyes)." (17 U.S.C. 602(a))

Date: August 29, 1983
File: CPR-3 CO:R:E:E
720900 SO

This ruling concerns whether or not two sample dolls resembling a monkey are infringing importations pursuant to sec. 602 of the Copyright Revision Act of 1976 (17 U.S.C. 602).

Issue: Would the importation from Korea of two dolls resembling monkeys infringe the rights of the copyright owner, Mattel, Inc., which has recorded their copyright registration for "Monchhichi No. 2 (opened eyes)" VA 15-392 with Customs for import protection?

Facts: The shipment referred to above arrived at Los Angeles. The District Director of Customs submitted samples of the two imported monkey dolls to Customs Headquarters for comparison purposes and asked for advice as to whether the imported dolls, described as (Product No. 1) and (Product No. 2) infringe the copyright registration of Mattel, Inc., for "Monchhichi No. 2 (opened eyes)." The importer denied that the imported articles infringed Mattel's copyright because they have been manufacturing and exporting these items to Europe, Australia, and the United States without problem and difficulty since 1979, and because they were represented by the agent in Korea to be regular stock items. Mattel posted bond and submitted a legal brief in support of their position

that the articles are infringing, and the case was submitted to Customs Headquarters for decision pursuant to Section 133.43(c)(1) of the Customs Regulations (19 CFR 133.43(c)(1)).

Law and Analysis: We examined the imported samples and large color photographs supplied by Mattel of the copyright protected work displayed side by side with the imported (Product No. 2) (displayed without the apron and bonnet) and noted that there were only minor differences in the appearance of the imported doll. The substantial similarity was even more apparent in the side by side photographs of just the molded vinyl heads of the two articles, without the painted faces and the plush hair. When the two heads are placed face to face, it appears as if the imported head is a mold copy of the Monchhichi Head, noting that their upper lips, noses, forehead plates, ears and chins line up precisely. The faces of both eight inch dolls have cylindrical mouth openings for receiving the pacifier which is gripped tightly in the right hand of each doll. The eyes of the imported eight inch doll show little difference from the Monchhichi doll's eyes. The rest of the face painting is also substantially similar, noting the five simulated freckles under each eye and the dark brown button nose. The imported two inch doll (Product No. 1) also has similar eyes, a cylindrical mouth opening for receiving an extended thumb, three simulated freckles under each eye and a dark brown button nose. The differences in the clothing worn by the dolls and some other non-essential deviations from the copyrighted doll appear to us to constitute a deliberate attempt to make minor variations in the appearance of the dolls while preserving a similar aesthetic appeal to the ordinary purchaser. Our general impression is that the articles appear to be almost identical. This identity rules out coincidence and independent creation.

The test employed to determine if a design has been copied is whether the ordinary observer who is not attempting to discover disparities between two articles would be disposed to overlook them and regard their aesthetic appeal as the same. The substantial similarity test was developed in order to bar a potential infringer from producing a supposedly new and different work by employing the tactic of making deliberate, but trivial, variations of specific features of the copyright protected work.

Two steps are involved in the test for infringement. There must be access to the copyrighted work and substantial similarity not only of the general ideas but of the expression of those ideas as well. Sekiguchi Co., Ltd. of Tokyo, Japan, is the owner of the U.S. copyright and has transferred all rights (with one exception) to Mattel. Sekiguchi's Monchhichi doll was published as early as November 29, 1974. Mattel introduced them to the trade in La Costa, California, in January, 1981, and at the 1981 American Toy Fair. The appearance of the dolls at the 1981 Easter Egg Roll on the White House lawn was shown on the NBC news. It is apparent that

the importer had an ample opportunity to view the copyrighted doll. Even without direct evidence of access to the copyrighted work, the substantial similarities between the works are so striking as to preclude the possibility that they were arrived at independently.

The two works involved in this case should be considered and tested not hypercritically or with meticulous scrutiny, but by observations and impressions of the average reasonable reader and spectator. The question of infringement herein demands an even more intrinsic determination due to the fact that both the copyrighted work and the imported article are directed to an audience of children. This raises the issue of the impact of the respective works upon the minds and imaginations of young people. The youngsters, in their enthusiasm to acquire the dolls, certainly are not bent upon "detecting disparities" or even readily observing upon inspection such details as the differences in the clothing worn by the dolls.

Section 602(a) of the Copyright Law (17 U.S.C. 602(a)) provides, with certain specified exceptions not applicable in this case, that importation into the United States, without authority of the owner of copyright under this title, of copies of a work that has been acquired outside the United States, is an infringement of the copyright. The Secretary of the Treasury is authorized to prescribe regulations for the enforcement of the provision of this title prohibiting importation.

Section 603(c) of the Copyright Law (17 U.S.C. 603(c)) provides that, "Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the Customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer has no reasonable ground for believing that his or her acts constituted a violation of law."

Holding: We are of the opinion that the imported dolls would be prohibited entry into the United States as infringing on the rights of the copyright owner, Mattel, Inc. The merchandise is subject to seizure and forfeiture in accordance with 17 U.S.C. 603. In appropriate cases, the district director may grant relief from forfeiture upon consideration of a petition submitted pursuant to 19 CFR 133.51(a), under conditions specified by him (19 CFR 133.51(b)). However, in cases where the importer satisfies the district director that he had no reasonable grounds for believing that his acts constituted a violation of law, and exportation is suggested as an alternative disposition for the seized merchandise, exportation of the

unlawfully imported articles would be limited by 17 U.S.C. 603(c) to returning the articles to the country of export.

(C.S.D. 83-34)

This ruling holds that the printed circuit boards produced in one Association of South East Asian Nations (ASEAN) country and imported into the United States directly from another ASEAN country would be considered to be imported directly from a beneficiary developing country within the meaning of 19 CFR 10.175(a). However, merchandise classifiable under item 676.52, TSUS, is not presently eligible for duty-free treatment under GSP if that merchandise is a product of Singapore.

Date: September 1, 1983
File: CLA-2 CO:R:CV:VS
071370 FF

This is in reply to your letter dated May 25, 1983, concerning the applicability of the Generalized System of Preferences (GSP) to articles produced in one Association of South East Asian Nations (ASEAN) country and imported into the United States directly from another ASEAN country.

You state that the merchandise in question consists of printed circuit boards used in personal and business computers and classifiable in item 676.52, Tariff Schedules of the United States (TSUS). You further state that the materials used in the manufacture of the printed circuit boards are purchased from manufacturers located in ASEAN countries and in the United States, that the circuit boards will be assembled from those components in Malaysia, and that the finished circuit boards will meet the 35 percent value requirement of the GSP based on the cost or value of those materials and processing operations which are attributable to ASEAN countries. It is your firm's intention to ship the finished circuit boards, accompanied by an appropriate Form A Certificate of Origin issued by the Malaysian Ministry of Trade and Industry, to Singapore where they will be tested; after testing, the circuit boards, accompanied by a final Form A issued by the Singapore Department of Trade, will be shipped from Singapore directly to the United States.

You note that General Headnote 3(c), TSUS, lists the ASEAN countries (Indonesia, Malaysia, Philippines, Singapore and Thailand) as an association of countries treated as one country for the purposes of the GSP. You therefore request confirmation that, under the applicable statutes and regulations, shipment of the circuit boards from Singapore to the United States would satisfy the requirement under the GSP that the eligible articles be imported directly from the beneficiary developing "country."

Section 502(a)(3) of the Trade Act of 1974, as amended (19 U.S.C. 2462(a)(3)), provides that in the case of an association of countries which is a free trade area or customs union or which is contributing to comprehensive regional economic integration among its members, the President may provide that all members of such an association shall be treated as one country for the purposes of the GSP. Section 503(b)(1) of the Trade Act of 1974, as amended (19 U.S.C. 2463(b)(1)), provides that duty-free treatment under the GSP shall apply only to an article which is "imported directly" from a beneficiary developing country. Section 10.171(b), Customs Regulations, indicates that all members of such an association designated by the President as one country for the purposes of the GSP "shall be treated as one country for purposes of §§ 10.171 through 10.178." Section 10.175(a), Customs Regulations, states that for the purposes of sections 10.171 through 10.178 the words "imported directly" mean "Direct shipment from the beneficiary country to the United States without passing through the territory of any other country."

Based on the above statutory and regulatory provisions and in the light of the designation of the members of the ASEAN as one country as set forth in General Headnote 3(c), TSUS, we are of the opinion that, under the circumstances described in your letter, the printed circuit boards in question would be considered to be "imported directly" from a beneficiary developing "country" within the meaning of section 10.175(a), Customs Regulations. However, since merchandise classifiable in item 676.52, TSUS, is not presently eligible for duty-free treatment under the GSP if that merchandise is a product of Singapore, it is suggested either that a copy of the original Form A issued by the Malaysian Ministry of Trade and Industry also be submitted with the entry or that the final Form A issued by the Singapore Department of Trade clearly indicate both that the merchandise is a product of Malaysia and that only testing was performed in Singapore, in order to demonstrate compliance with the country of origin requirements under the GSP.

(C.S.D. 83-35)

This ruling holds that under section 402(b)(3)(A)(i), Trade Agreements Act of 1979 (TAA), the only construction, erection and assembly costs which are deductible from the price actually paid or payable relate to activities performed after the mer-

chandise has been imported into the United States. C.S.D. 79–1 cited. Since the assembly operation of an offshore drilling platform preceded the importation of the platform, the costs associated therewith are not deductible from the price actually paid or payable for the merchandise. (section 402(b)(3), TAA)

Date: September 2, 1983
File: CLA–2–CO:R:CV:VS
543117 BS

In your letter dated June 17, 1983, addressed to our Carrier Rulings Branch, you requested a ruling on whether the cost of certain cranes rented or purchased from United States suppliers would be deductible from the transaction value of an offshore drilling platform constructed in a beneficiary developing country. In a conversation on June 6, 1983, with Mr. Shulman of my staff, you indicated that subsequent to their acquisition in the United States, the cranes would be transported to a yard in a western hemisphere beneficiary developing country, and used to assemble various constituent parts into a completed platform. Thereafter, the platform would be towed from the beneficiary developing country to a point beyond the three miles limit for erection on the continental shelf.

Under transaction value the only costs deductible from the price actually paid or payable are found in section 402(b)(3) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA). More specifically, under section 402(b)(3)(A)(i), TAA, the only construction, erection, and assembly costs which are deductible from the price actually paid or payable relate to activities performed *after* merchandise has been imported into the United States.

In Customs Service decision 79–1 (copy enclosed) it was held that foreign-built drilling and production platforms which are not vessels are imported when they are either permanently or temporarily attached to the seabed of the outer continental shelf. Accordingly, because it appears that the assembly operations described in your ruling request will precede the importation of the platforms, the costs associated therewith are not deductible from the price actually paid or payable for the merchandise.

(C.S.D. 84–36)

This ruling holds that metal articles exported without registra-

tion and without the intent to return them to the United States for further processing may be accorded 806.30, TSUS treatment, providing failure to comply with registration requirement was due to inadvertence, mistake, or inexperience, and not to negligence or bad faith. Section 10.9(k), Customs Regulations

Date: September 19, 1983
File: CLA-2 CO:R:CV:VS
071309 FF

This ruling is in response to the Application for Further Review of Protest No. 0901-2-000150 dated April 5, 1982.

Issue: The question presented is whether for the purposes of item 806.30, Tariff Schedules of the United States (TSUS), an intent to return an article to the United States for further processing must exist at the time that the article is exported to a foreign country for further processing.

Facts: The merchandise in question consists of mounting flanges, wheel hub supports, and frame structures, used as components in model GE 772 motorized wheels for off-highway vehicles. These components were initially manufactured in the form of raw and semi-finished castings, forgings, etc. by the (Company Name & Address); they were then sent by (Co.) to Canada for further processing into completed components by the Canadian (Company Name). At the time that the products were exported to Canada it was not intended that they would be returned to the United States for further processing; rather, it was intended that the manufacture of those components would be completed in Canada and that (Co) would then either assemble them into complete wheels or ship them as parts to (Co.) for final wheel assembly. At the same time, (Co) also fabricated the same parts from Canadian sources and either assembled those components into complete wheels or shipped them to (Co.) for assembly. Thus, identical operations were performed at both locations and partially finished components were shipped between both locations for further processing in order to meet production, shipping, and customer requirements at both ends.

However, over a period of 2 years (Co.) expanded its manufacturing capacity and the (Co) operation was gradually phased down and was finally terminated in April 1978. This resulted in an excess inventory of components originating at (Co.) which had been only partially further processed by (Co) and which therefore had to be returned to (Co.) for further processing (*i.e.,* completion); it is these components which are the subject of the present protest. According to the attachment to Customs Form 6445 contained in the protest file, it is not disputed that the imported items 1) are articles of metal of United States manufacture, 2) were exported to Canada for further processing, 3) were processed further there, and 4) were subsequently returned to, and further processed in, the United

States. The record also indicates that none of the subject merchandise was registered at the time of exportation to Canada since it was intended at that time to complete the processing in Canada rather than to return the merchandise to the United States for further processing.

Following entry of the subject merchandise but prior to liquidation, the importer claims to have filed a written request for waiver of production of the Certificate of Registration (Customs Form 4455) in connection with a claim for treatment under item 806.30, TSUS; no specific action was taken by the Customs Service on this waiver request. The claim for entry under item 806.30, TSUS, was disallowed solely for the reason that when the merchandise in question was exported to Canada there was no intent to return any of the items to the United States for further processing. Accordingly, duty was assessed on the full value of the imported merchandise either under the provision for other parts of motor vehicles in item 692.27 (now 692.32), TSUS, or, in the case of entry No. 269586 of April 13, 1978, under the provision for fork-lift trucks, platform trucks and other self-propelled work trucks, and platform tractors, of off-the-highway types, and parts thereof, in item 692.40, TSUS. Although counsel for the importer argues that the latter classification was incorrect since the merchandise covered by that entry was of the same class or kind as the merchandise covered by the other three entries which are the subject of the present protest, the submitted protest file does not contain the documents pertaining to that entry and therefore this issue is not discussed here.

Law and analysis: Item 806.30, TSUS, covers articles returned to the United States after having been exported to be advanced in value or improved in condition by any process of manufacture or other means and provides specifically for the assessment of duty only upon the value of processing outside the United States of the following class of articles:

> Any article of metal (except precious metal) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

Section 10.9(a), Customs Regulations, states that, before the exportation of articles subject to tariff treatment under item 806.30, TSUS, a Certificate of Registration (the top portion of Customs Form 4455) shall be filed by the owner or exporter with the district director of Customs so as to permit an examination of the articles. That provision further requires that a statement be included on the reverse side of Customs Form 4455 indicating, *inter alia,* that "The articles in their changed conditions will be returned for further processing by ——— (Name and address)". Section 10.9(f), Customs Regulations, states that in connection with an entry

under item 806.30, TSUS, there shall be filed both the Certificate of Registration (Customs Form 4455) and a declaration by the owner, importer or other party having knowledge of the facts stating, *inter alia,* that the articles entered in their processed condition are the same articles covered by the Certificate of Registration. Section 10.9(k), Customs Regulations, states, *inter alia,* that "In any case where an imported article was exported for processing without compliance with the registration requirements of this section, the district director may waive the Customs Form 4455 if he is satisfied that the returned merchandise is entitled to entry under item 806.30, and that the failure to comply with the registration requirements was due to inadvertence, mistake, or inexperience, and not to negligence or bad faith."

It is the position of the importer that the wording of item 806.30, TSUS, does not imply that, at the time of exportation from the United States for processing, it must be demonstrated that the articles are intended for subsequent further processing in the United States. In this regard it is argued that item 806.30, TSUS, merely requires, first, that the article be exported from the United States for further processing and, second, that the article after processing outside the United States be returned for further processing. The importer therefore is of the opinion that it is consistent with the wording of item 806.30, TSUS, for a United States manufacturer to recall the exported merchandise at any given point of processing and to complete the processing in the United States. As concerns the question of intent strictly within the confines of the statutory language, counsel for the importer clarifies this argument by pointing out that whereas the phrase "exported for further processing" designates the purpose or intent at the time of exportation, the phrase "is returned for further processing" describes a separate and distinct intent which arises only at the time of return to the United States; thus, it is the importer rather than the exporter who must demonstrate both the intent and the fact of further processing after return.

We are in substantial agreement with the arguments presented by the importer and by counsel as concerns the meaning to be ascribed to the statutory language. In this regard it is to be noted that while the words "for further processing", which appear twice in item 806.30, TSUS, clearly involve an element of intent, the same cannot be said for the words "is returned to the United States" since the latter words have reference to a factual situation only. In other words, it is the actual return of the merchandise to the United States which gives rise to the requirement that there be an intent to perform further processing in the United States; in the absence of a return of the merchandise to the United States the question of intent becomes irrelevant because there will be no claim for entry under item 806.30, TSUS.

We are also of the opinion that this interpretation of the statutory language is supported by the relevant provisions in the regulations. It seems clear that the registration procedures set forth in section 10.9(a), Customs Regulations, assume that a complete transaction within the meaning of item 806.30, TSUS, is contemplated at the time of exportation; it is only in this context that the exporter or owner may state on the reverse of Customs Form 4455 that the articles in their changed conditions "will be returned" for further processing. The registration requirements are intended solely to facilitate verification of a claim for item 806.30, TSUS, treatment but they do not impose a legal obligation on the part of the exporter to return the articles to the United States. Moreover, there is no absolute requirement that the registration procedures be followed since under section 10.9(k), Customs Regulations, the district director may accord item 806.30, TSUS, treatment even if no Customs Form 4455 is available due to a failure to comply with the registration requirements. It should also be noted that in a situation covered by section 10.9(k), Customs Regulations, the question of intent to return within the meaning of section 10.9(a), Customs Regulations, does not arise since section 10.9(k) does not require such a showing of prior intent but rather merely requires that there be compliance with the statutory language: thus, provided that the failure to comply with the registration requirements was not due to negligence or bad faith, it is only necessary to determine whether the metal articles were manufactured or processed in the United States, whether they were exported for further processing which was performed, and whether they were in fact imported for further processing in the United States.

We have reviewed a number of earlier rulings issued by Headquarters concerning the applicability of item 806.30, TSUS, in which it was stated that the district director of Customs must determine whether the requisite intent existed at the time of export that the metal article would be returned to the United States for further processing. We believe that such statements in those earlier rulings generally had reference to the usual situation whereby the registration procedures set forth in section 10.9(a), Customs Regulations, were followed, and in that context those statements were correct. However, in a case such as the present one where the registration procedures were not followed, that general statement is not correct as concerns the question of intent to return and thus should not be used to deny item 806.30 treatment on imported merchandise which meets the requirements of the statute and of section 10.9(k), Customs Regulations.

Based on the statements contained in the attachment to Customs Form 6445 it appears that the merchandise at issue satisfied all of the requirements set forth in the statute. Moreover, the present record contains no indication of negligence or bad faith on the part of the exporter within the meaning of section 10.9(k), Customs Reg-

ulations. We therefore believe that there is a firm basis to waive the Customs Form 4455 and to accord item 806.30, TSUS, treatment to the subject merchandise.

Conclusion: In the light of the above, the protest should be allowed in full. A copy of this decision should be attached to your Form 19 Notice of Action to be sent to the protestant. The protest file is enclosed.

(C.S.D. 84-37)

This ruling holds that a basic "CAT" scanner system is properly classifiable as an entirety under the provision for other electromedical apparatus, and parts thereof, in item 709.17, TSUS

Date: September 26, 1983
File: CLA-2 CO:R:CV:S
067987 FF

This ruling is in response to the Application for Further Review of Protest No. 5401-1-000089, dated November 4, 1981.

Issue: The question presented is whether a complete "CAT" scanner system is properly classifiable as an entirety under the provision for other apparatus based on the use of X-rays, and parts thereof, in item 709.63, Tariff Schedules of the United States (TSUS).

Facts: The merchandise in question is described as a complete (Co.) "CAT" (computer-assisted, or computer-axial, tomography) scanner system which is used in medical applications to diagnose a patient's physical condition. According to counsel for the importer the basic scanner system comprises a scanning gantry, an operator's control and viewing console, a computer/electronics unit, a line printer and various power supplies and ancillary units, all of which are said to be related to the purpose of the system which is to produce a three-dimensional representation of tissue structure. The nature and operation of these components is described by counsel as follows:

The scanning gantry consists in part of an X-ray tube mounted on a rotating frame directly opposite and in line with an array of X-ray detectors; the temperature of the X-ray tube is regulated by an associated oil cooler and the voltage required to produce the X-ray is provided by an H.T. (high tension) generator. The gantry also houses a mobile, motor-driven patient's couch which is adjusted prior to the scanning sequence by a motor control unit located beside the couch. During the scanning sequence the frame incorporating the X-ray tube and detectors is rotated in 10-degree notches around the couch, with an X-ray of the patient taken at each 10-degree interval, until a scanning sequence spanning 180 degrees is completed. At each 10-degree interval the X-ray beam sweeps a cross section of the patient's body and, as the beam passes through

the anatomical materials, the intensity of the beam is altered by tissue absorption in the beam's path and the resulting absorption values are picked up by the detectors.

The information received by the detectors is transmitted in digital form to the computer/electronics unit which incorporates, in addition to a data processor, an electronics assembly which governs the interactions of all elements of the system. The data processor is used to process information from each complete scan in order to construct a visual and numeric three-dimensional representation of a body cross section. The computer/electronics unit also incorporates a magnetic disc store which contains information necessary for the operation of the system, serves as a buffer store for input data from the X-ray detectors, and provides a limited storage for the processed computer data that permits a video display, a photographic recording, or a numeric printout on the separate line printer. It is stated that the computer/electronics unit is the crucial processing agent of the system.

The operator's control and viewing console incorporates safety interlocks with the gantry in order to provide essential mechanical, electrical, and radiation safeguards. This console also contains all controls necessary to set the initial parameters for the X-ray scan, to monitor the scan procedure, to check and readjust current voltage, scan speed and angle and other parameters for each scan and to control the patient couch once the scan sequence has commenced. It also incorporates a visual display unit and keyboard controls as well as automatic error detection programs that reduce the need for repeated scans. The console controls further permit the three-dimensional image on the VDU screen to be adjusted for window width and window level, thus adding depth and selectivity of vision of the X-ray "photograph." It is stated that the scanner system cannot be operated without the console and the essential safety features which it provides.

The line printer is controlled from the operator's console and provides a numeric readout of every point in the scan indicating absorption at each point, thus permitting a quantitative assessment of the scan results to assist in diagnosis. Finally, the basic scanner system also includes a motor generator and motor generator control, which are used to power the system, and customer and installation spares.

It appears, based on a packing list included in the file, that one or more of the entries covered by the subject protest included, in addition to the basic scanner system described above, a diagnostic display console, a magnetic tape phase decoder, a magnetic tape unit and a 320 matrix option. These items are described in the accompanying (Co) literature as constituting a free-standing, optional Independent Viewing System intended to enhance the diagnostic facilities of the scanner. The diagnostic display console is described as a mobile "320 x 320 matrix viewing unit with camera, keyboard,

and cursor control"; it also incorporates a television monitor display and a magnetic floppy disc unit and is used for viewing, photographing, and storing the results of patient scans. The magnetic tape phase decoder, which is assumed to be the "data transfer module" described in the (Co.) literature, allows patient scan data to be transferred to or from a floppy disc for subsequent viewing on the diagnostic display console. The magnetic tape unit is used for bulk storage of digital patient scan information to assist in the reproduction of pictures or printouts on the scanner equipment, to compile statistical or other research information or to input to a central data bank of patient records. The "320 matrix option" appears to be a reconstruction algorithm software package used to produce a three-dimensional image with a higher definition than that of the standard "160 x 160 matrix"; although the 320 matrix may be used both in the basic scanner system and with the optional Independent Viewing System, it is assumed that the imported product is intended for use with the latter.

Law and analysis: Counsel for the importer takes issue with Customs decision to classify the CAT scanners under several different provisions based on component groups. It is argued that each system should have been classified as an entirety under the provision for other apparatus based on the use of X-rays in item 709.63, TSUS. Moreover, notwithstanding the entireties issue, it is argued that the TSUS provisions under which the subject entries were liquidated were not the provisions which should apply to the component groups identified by Customs; in this regard it is specifically alleged, *inter alia,* that the 320 matrix option should be classified under the provision for magnetic recordings, recorded on magnetic tape or on any medium other than wire, in item 724.40, TSUS.

A. *The Entireties Issue*

It is necessary to deal first with the entireties question since a determination that any of the CAT scanner components should be classified together as an entirety would obviate any discussion of their classification either separately or according to component groups. In this regard counsel for the importer states that each of the entries covered by the protest involved a complete, unified scanner system which was purchased by the customer as a unit. Moreover, it is stated that the various components of the scanner system represent a collection of features adapted to, and necessary for, the accomplishment of a specific end purpose, *i.e.,* the production of medical information in visual and numeric form based on the use of X-rays. In addition, counsel alleges that the protested classifications were based on a Headquarters ruling dealing with the classification of a "(Product Name) X-ray Analysis System"; it is argued that neither the facts nor the court cases cited in that earlier ruling are applicable to the present case.

In *Altman & Co. v. United States,* 13 Ct. Cust. Appls. 315, T.D. 41232 (1925), the court set forth the basic entireties doctrine as follows at page 318 based on a review of earlier court cases:

> A consideration of these pronouncements of the courts leads to the conclusion that if an importer brings into the country, at the same time, certain parts, which are designed to form, when joined or attached together, a complete article of commerce, and when it is further shown that the importer intends to so use them, these parts will be considered for tariff purposes as entireties, even though they may be unattached or enclosed in separate packages, and even though said parts might have a commercial value and be salable separately.

In a long line of subsequent court cases a number of additional criteria have been laid down to determine whether multiple components could be considered to be an entirety for tariff purposes. In *Silvine Importers, Inc. v. United States,* 57 Cust. Ct. 362, C.D. 2821 (1966), the court specifically mentioned mechanical coupling or physical joinder, functional interplay, unified packaging, and merger and subordination of identity. That case involved the classification of electric pots and electric cords which the court held did not constitute an entirety for the reason that both the electric pot and the electric cord retained their separate identities, and in this regard it was demonstrated that the electric cord was designed for use with a variety of different electric appliances and thus was not restricted to use with the electric pot in question. The court explained the essential concept of merger and subordination of identity as follows at pages 367–368:

> If the individual identity and function of the components, while still discernible, have been superseded by and absorbed into the identity and function of the resulting article, that article is an entirety. See *Donalds Ltd., Inc. v. United States,* 32 Cust. Ct. 310, C.D. 1619, where the above requirement was met and a capsule containing cotton impregnated with an inhalant was held to be an entirety. Where one of the components remains capable of varied uses unrelated to the other component, a union of the two does not produce an entirety. This is so even if, when used together, the components are physically united and functionally interdependent.

In *Davar Products, Inc. v. United States,* 61 Cust. Ct. 57, C.D. 3526 (1968), the court noted that the multiplicity of product designs and their rapid evolution requires a certain amount of flexibility in deciding whether a product constitutes an entirety. *Davar* involved the classification of battery-operated carving knives, each of which consisted of a detachable blade and a handle or power unit. Although there was testimony to the effect that the power unit was designed to work with other attachments in addition to knife blades, the court did not agree that this was dispositive of the entireties issue. The court stated as follows at pages 60–61:

> Plaintiff advances a number of arguments based upon the nature of the power unit. One contention seems to be that the portion of the importation which consists of power units may be used to power either knives, massagers or back-scratchers and, hence, is not dedicated to use with the knives as battery-operated knives. We consider this position to be untenable. To the extent that the testimony is clear, the merchandise involved in the instant importation consists of equal numbers of blades and power units, and it does not appear that the latter are used to power any other articles. The other applications of the power unit appear to be accomplished with other importations.

In discussing the question of segregability of components, the court in *Davar* went on to state as follows at page 61:

> Plaintiff suggests that the power unit is an individual and separate article of commerce and, hence, does not, when used with the knife, produce an entirety. We do not consider this argument valid, however, for whatever degree of separateness the power unit may have as an independent article of commerce does not serve to vitiate the entirety which results from its association with the knife blade. The separation of an article into its several components for the purposes of tariff classification results from the independent nature of all its component articles, not just one of them.* * *

In holding that the knife blade and power unit constituted an entirety, the court in *Davar* emphasized that the blade did not perform the function of a knife independently of the power unit; rather, the blade was totally dependent on the power unit in that the cutting capacity and utility of the blade derived solely from the power unit. On this basis the court was able to distinguish the *Silvine* case as well as the case of *Columbia Shipbuilding Co. et al. v. United States,* 11 Ct. Cust. Appls. 281, T.D. 39085 (1922). The latter case involved the classification of steam engines and blower fans which, although designed to be operated together to supply a forced draft to the boilers of vessels, were found by the court to be complete within themselves and capable of either use for other purposes (the engines) or operation by other means of propulsion (the fans); the court concluded that each article retained its own name and essential character and that when in use together they did not form a new or different article having a different name or character.

In *United States v. Mannesmann-Meer, Inc.,* 54 CCPA 24, C.A.D. 897 (1966) the court considered the classification of a complete welded tube manufacturing plant consisting of a forming mill, a welding table, a cooling mill, a sizing mill, a cutoff device, and a storage bin. In holding that the plant was an entirety for tariff purposes, the court stated as follows at page 27:

> The record clearly discloses that the apparatus under consideration was designed and used as a composite unit with the single purpose of taking raw material and producing therefrom a finished product, viz., a welded tube. To this end, the composite elements or parts functioned in combination. Without each successive part taking the basic material from its predecessor in the continuous process of manufacture, the apparatus would not execute its end purpose of producing a finished welded product.* * *

Turning now to the merchandise involved in the present case, it appears that the CAT scanner satisfies the basic criteria for an entirety as set forth in the *Altman* case since, as stated by counsel for the importer, the parts of the system were imported at the same time with the intention of selling and using them together as a complete article of commerce. In addition, there seems to be no doubt that all components of the system are intended to be connected together, chiefly through transmission lines which send information or power from one component to another. We are also of the opinion that the criterion of functional interplay is satisfied in that all of the components work together either in general terms for the purpose of medical diagnosis or more specifically to create a three-dimensional visual representation of a patient's anatomy. We are therefore in substantial agreement with the importer's arguments on these points.

As concerns the more difficult question of merger and subordination of identity, it is necessary to consider the relationship between the scanning gantry, the computer/electronics unit and the operator's control and viewing console. It seems clear that the scanning gantry is not designed as a conventional X-Ray apparatus but rather incorporates a design specially adapted for taking a precise, controlled series of X-ray absorption values, none of which has any significant individual value since a tangible X-ray photograph as such is not produced except by later reconstruction from the stored computer data; the incorporation of the patient's couch within the gantry and the fact that the gantry is designed to rotate in a 180 degree arc around the couch goes beyond the requirements for a conventional X-ray apparatus. It is equally clear, given its specialized design and function, that the scanning gantry would have no practical application unless associated with a computer designed to receive and process the digital information picked up and transmitted by the detectors within the gantry. The operation of the scanning gantry is also dependent in part on the operator's console which both controls the movement of the patient's couch and serves to monitor and adjust the X-ray procedure. Furthermore, the console itself, which incorporates a keyboard specialized for use during the scanning procedure, is dependent on the computer which creates the three-dimensional image displayed on the VDU screen incorporated in the console. We therefore agree with counsel's contention that the computer/electronics unit is the crucial

element without which the other parts of the system would not properly function as designed. Accordingly, we are of the view that the scanning gantry and the operator's control and viewing console are clearly designed for use with, and dependent on, the computer/electronics unit, and that the individual identity and function of those components, however recognizable, have been superseded by and absorbed into the identity and function of the system as a whole.

It is therefore our position that these three components demonstrate an interdependence which goes beyond the mere functional interplay associated with a series of components; accordingly, they should be considered as an entirety for tariff purposes under the principles enunciated in the *Silvine* and *Davar* cases as set forth above. Moreover, with reference to the decision in the *Mannesmann-Meer* case, *supra*, we believe that the other items described as forming part of the basic scanner system should be classified as part of the entirety formed by those three major components. As concerns the oil cooler, motor generator, motor generator control, customer and installation spares and H.T. generator, it is noted that each bears a direct, integral relationship to the proper installation or functioning of the system. As far as the line printer is concerned, it is noted that it is described in the (Co) literature not as an optional item but rather as forming a part of the basic diagnostic procedure; during the course of an inspection of a CAT scanner system at a local hospital, we were informed by a medical technician that an (Co) scanner cannot properly function without the line printer which provides the codes necessary to access stored computer data used during the scanning sequence. Based on this resolution of the entireties issue, it is not necessary to discuss the earlier classification decision concerning the "(Product Name) X-ray Analysis System."

We do not, however, believe that the items described in the EMI literature as constituting the Independent Viewing System should be classified as an entirety with the basic scanner system. In this regard we note that these items are described as being independent of, and optional to, the basic scanning system; our inspection of an operational CAT scanner confirmed that they are not in any way essential to the proper functioning of the basic system. Thus, while there may be a degree of functional interplay when these items are connected to the basic scanner system, the requisite merger and subordination of identity does not appear to exist.

B. *The Question of Classification*

The question of classification was the subject of a conference held at Headquarters on January 21, 1983, with representatives of the importer and counsel for the importer. The discussion at that meeting centered on the proper classification to be given to the basic scanner system as an entirety, and the specific issue addressed was whether this merchandise should be classified as an

apparatus based on the use of X-rays (or as an X-ray apparatus as such) in item 709.63, TSUS, as claimed by the importer, or as an electro-medical apparatus in item 709.17, TSUS. The specific issues raised in support of the importer's position, as set forth in a written submission presented at that time, are discussed below.

Whether a CAT Scanner Is an Apparatus "Based On" the Use of X-Rays

In support of the argument that a CAT scanner is an apparatus based on the use of X-rays within the meaning of the heading immediately superior to the provision covered by item 709.63, TSUS, counsel for the importer cites the decision in *United States v. Siemens America, Inc.*, 653 F.2d 471 (CCPA 1981). That case involved the question of whether hermetically sealed surge voltage protectors (SVPs), which utilized the ionization of argon gas to provide a conductive path for unwanted surges of voltage and which also contained the radioactive substance Pm 147, were classifiable under the provision for apparatus based on the use of radiations from radioactive substances in item 709.66, TSUS.

In discussing the scope of item 709.66, TSUS, the court in *Siemens* stated that the "based on" language in that provision evinced a Congressional intent to limit the provision to goods in which the use of radiation is a fundamental and essential constituent and that, therefore, the use of radiation must be an indispensable requisite for the apparatus. Since the court found that the function of the SVPs was determined by their physical characteristics (*i.e.*, electrode spacing and gas fill pressure) rather than by the presence of the PM 147 which merely helped to stabilize the breakdown voltage and increase the speed of the ionization, it was held that the SVPs were not classifiable in item 709.66, TSUS. Counsel for the importer in the present case argues that a CAT scanner is "based on" the use of X-rays within the principle enunciated in the *Siemens* case since the use of X-rays is a fundamental and essential constituent and an indispensable requisite for the apparatus, given that a CAT scanner cannot function without the use of X-rays.

Although we can agree that the X-ray function performed by the scanning gantry is an indispensable requisite for the proper functioning of the basic scanner system, we do not believe that the holding in the *Siemens* case is necessarily applicable to a CAT scanner which operates on a principle which is considerably more complex than that of the merchandise at issue in that case. In this regard we note that the basic scanner system is an entirety made up of several components, the two most important being the scanning gantry and the computer/electronics unit, which work in different ways toward a common end. Given the at least equal importance of the computing function as discussed above in connection with the entireties issue, we do not believe that the basic scanner system can be described simply as an apparatus based on the use of X-rays (see also the discussion of the "more than" doctrine below).

Whether a CAT Scanner Constitutes an X-Ray Apparatus

In support of the argument that the basic scanner system is an X-ray apparatus and thus falls within the specific wording of the provision covered by item 709.63, TSUS, counsel for the importer states the generally accepted principle that tariff terms are to be construed in accordance with their common meaning or in accordance with their commercial designation if different from the common meaning. It is further alleged that CAT scanners are considered to be "X-ray apparatus" in common and commercial parlance as demonstrated by the treatment of CAT scanners as X-ray apparatus in various United States Government classification schemes and within the medical profession. As examples of United States Government classification schemes wherein CAT scanners are treated as X-ray systems or devices, counsel cites regulations regarding radiation safety promulgated by the Food and Drug Administration under the Radiation Control for Health and Safety Act of 1968, the Medicare Intermediary Manual under the Federal Medicare program, the Patent Classification Definitions issued by the United States Patent and Trademark Office and the United States patent covering the invention on which the CAT scanner is based, and the "U.S. Industrial Outlook" published by the United States Department of Commerce. As concerns the medical profession, it is stated that radiologists and other medical practitioners invariably consider a CAT scanner to be an X-ray apparatus rather than an electro-medical apparatus and that CAT scanners are uniformly located in radiology departments of hospitals while electromedical apparatus such as electrocardiographs and electroencephalographs are located in other departments.

Although we agree with counsel's statement concerning the general principle utilized for the construction of tariff terms, we do not believe that the specific examples put forward by counsel clearly demonstrate that the merchandise at issue represents simply an X-ray apparatus within the meaning of item 709.63, TSUS. As concerns the classification schemes of other Government agencies cited by counsel, it is well settled, based on a long line of court decisions, that the definition of a term contained in a statute or regulation dealing with nontariff matters does not determine the common meaning of that term for tariff purposes; see, for example, *United States v. Mercantil Distribuidora, S.A., Joseph H. Brown,* 43 CCPA 111, C.A.D. 617 (1956) and *International Spring Mfg. Co. v. United States,* 85 Cust. Ct. 5, C.D. 4862 (1980). As far as the views of the medical profession are concerned, it must be recognized that those views are also not necessarily dispositive, particularly where the common meaning of a term as understood by such persons must yield to the needs of tariff classification with reference to the nature of the particular product at issue. Accordingly, we are of the opinion that the above arguments presented by counsel do not resolve the fundamental issue involved in this case.

Whether a CAT Scanner Constitutes "More Than" an X-Ray Apparatus

In our opinion the decision on classification of the basic CAT scanner system must turn on the question of whether or not it constitutes more than an X-ray apparatus within the meaning of item 709.63, TSUS. Counsel for the importer cites the case of *Robert Bosch Corp. v. United States,* 63 Cust. Ct. 96, C.D. 3881 (1969) for a statement of the "more than" doctrine. The court in *Bosch* explained the doctrine as follows at pages 103–104:

> The principle is well settled that where an article is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute. [Citations omitted] By contrast where the difference is in the nature of improvement or amplification, and the essential character is preserved or only incidentally altered, the applicable rule is as expressed in *Nootka Packing Co. et al. v. United States,* 22 CCPA 464, T.D. 47464 (1935), that an unlimited *eo nomine* statutory designation includes all forms of the article in the absence of a contrary legislative intent or commercial designation. [Citations omitted].

Counsel argues that the "more than" doctrine is inapplicable in the present case for the reason that the courts in applying the doctrine have consistently held an article to be classifiable on the basis of its primary design, construction and function, even though it is capable of performing other functions which support, improve or enhance the primary function. In this regard the following cases are cited by counsel: *United States v. Oxford International Corp.,* 62 CCPA 102, 517 F.2d. 1374, C.A.D. 1154 (1975); *United Carr Fastener Corporation v. United States,* 54 CCPA 89, C.A.D. 913 (1967); and *Schick X-Ray Co., Inc. v. United States,* 64 Cust. Ct. 430, C.D. 4013 (1970). The latter case involved the classification of an automatic high-pressure injector which was used to inject a dye into the bloodstream so that X-rays could be taken of the cardiovascular system and which incorporated a system to control the temperature of the dye, a hydraulic pump and a device to coordinate the injector with the X-ray equipment; the court concluded that the product at issue was classifiable as a syringe in item 709.13, TSUS, rather than as an electro-medical apparatus in item 709.17, TSUS, because its primary function remained that of a syringe, even though it was more complex and improved than its predecessors due to its additional auxiliary features which solved certain problems or demands of the function which it served. Counsel argues by way of analogy to the *Schick X-Ray* case that the CAT scanner is essentially "a more complex and improved" X-ray device than its predecessors and that its "primary function is still the same as any other" X-ray apparatus, *i.e.,* to produce a picture of the interior of

the human body by passing X-rays through the body. Counsel then makes the following points to support the conclusion that classification of the CAT scanner should not be affected by the presence of the computer:

1. A CAT scanner without a digital computer is still a functional X-ray machine, and the same scanning function can be and has been performed without a computer.
2. A U.S. patent has been issued to a Dutch inventor covering an X-ray tomographic scanner system which does not make use of a computer.
3. The U.S. patent covering the (Co) CAT scanner notes that a digital computer could actually be unnecessary for a CAT scanner if a special type of cathode ray tube were used instead.
4. Even conventional X-ray systems use a computer to control the amount of radiation.
5. A technical publication entitled *Computed Tomography Technology* by Euclid Seeram supports the conclusion that an X-ray device aided by a computer is still essentially an X-ray device. In this regard, two main conclusions are drawn from that publication: (1) the principal function of the CAT scanner's computer is to furnish precise processing of X-ray measurements for body tissues traversed by the scanner's X-ray beam, thereby indicating the fundamental subordination of the computer to the essential X-ray function of the CAT scanner and (2) improvements in the technology of CAT scanners have resulted from developments in X-ray beam scanning techniques (*i.e.*, through reduction of the scan time) rather than from improvements in computer presentations of the results of the scans.

Counsel also relies upon a study conducted by the Office of Technology Assessment of the Congress which discusses the history, development and operating principles of CAT scanners; counsel states that the implicit assumption of this discussion is that the CAT scanner is a revolutionary diagnostic improvement on conventional X-ray technology but is still in essence an X-ray device. Finally, counsel asserts that Customs Service practice further supports classification of the CAT scanner as "X-ray apparatus" and in this regard reference is made to several earlier rulings wherein systems which included both an X-ray source and a device for measurement and/or analysis of the X-rays were classified as entireties under item 709.63, TSUS.

Although we recognize the validity of the general principle for which counsel cites the *Oxford International, United Carr Fastener* and *Schick X-Ray* cases, we believe that those cases can be distinguished from the present case. In each of those cases the court's conclusion was based on a finding that the function of the article at issue remained essentially the same in spite of certain subsidiary improvements or embellishments incorporated therein. However, the principle upon which something operates is not the same thing as its use, and in order to classify a product as an X-ray ap-

paratus it must be demonstrated that it operates essentially on the basis of X-rays. The fact that both conventional X-ray apparatus and CAT scanners are used to produce a picture of the interior of the human body by passing X-rays through the body is not, in itself, reason to conclude that both types of apparatus should be classified in the same tariff provision: this statement ignores entirely the central role which the computer plays in the design of a CAT scanner. For the reasons set forth below, we believe that the CAT scanner computer represents considerably more than a subsidiary improvement or embellishment within the meaning of the court cases cited by counsel.

As concerns the function of the computer, we believe that it is inconsistent on the one hand to stress the importance of the computer to support the argument that the CAT scanner is an entirety for tariff purposes and on the other hand to minimize the importance of the computer in dealing with the question of tariff classification: in our opinion the essential nature of the product and the relationship between its components remain the same for both purposes. With regard to the argument that a CAT scanner without a digital computer is still a functional X-ray machine, we doubt that this is the case since a digital computer is necessary to process the digital information picked up by the detectors into a readable analog format. As concerns the second and third points made by counsel regarding scanner systems which do not incorporate computers, we note that these are hypothetical examples which bear no relationship to the apparatus at issue which in fact does incorporate a computer. With respect to the fourth point, the fact that some conventional X-ray systems use a computer to control the amount of radiation has no bearing on the present case since the use of a computer strictly within the confines of the X-ray procedure itself is not the same as the use of a computer for other purposes after the X-ray tube has been turned off.

With respect to counsel's arguments based on *Computed Tomography Technology* by Euclid Seeram, we agree that the principal function of the computer is to process the X-ray measurements obtained from the scanning gantry; however, for the reasons stated in the discussion of the entireties issue we do not agree that the computer is subordinated to the X-ray function of the gantry. Nor do we believe that the nature of improvements in the technology of CAT scanners is conclusive in the present case since the further development within a created technology is quite different from the historical importance of the actual creation of that technology. In our opinion the classification of a CAT scanner must be considered in the light of what its design represents vis-a-vis what went before, and in this regard we note the following which appears at page 33 of Mr. Seeram's publication:

> Computed tomography (CT) is probably the most significant development in the history of medical imaging since the dis-

> covery of X-rays in 1895. The information presented in a CT image is different from that in a conventional radiographic image. The most conspicuous difference is that CT shows cross-sectional views of patient anatomy. * * *

In addition, the following is stated at page 37 of that publication:

> CT is a new type of cross-sectional tomographic imaging in which all unwanted planes or layers of a body are completely eliminated using mathematical techniques. The goal of CT is to detect radiation that has passed through a body (*e.g.,* patient) at multiple angles, and with the aid of a computer, to reconstruct a cross section of absorption values for that body section. The computer is used to store the data (X-ray transmission values) and reconstruct an image from these data.

Moreover, on page 29 of that publication the following is stated in the summary of the chapter dealing with the fundamentals of the computer: "This chapter presents an overview of the computer with respect to what it is and how it works. It also describes a few essential basic elements of digital image processing, since they form the basis for CT."

In our opinion a CAT scanner is not, strictly speaking, an X-ray apparatus since its function is to create a cross-sectional (*i.e.,* three dimensional) representation of tissue structure which is quite beyond the two dimensional capability of an X-ray apparatus. Given the essential role of the computer in manipulating the X-ray data so as to reconstruct an image which is beyond conventional X-ray technology, we are unable to conclude that the use of the computer represents merely an improvement, amplification or incidental alteration of an X-ray apparatus. Rather, we are of the opinion that it is the computer which makes a CAT scanner particularly significant in the area of medical diagnosis. We, therefore, view a CAT scanner as a revolutionary, rather than evolutionary, development, and we believe that the specific design of a CAT scanner and the interrelationship of its components are more important for the purpose of determining classification than the fact that both X-ray apparatus and CAT scanners are used to obtain a "picture" of the interior of a patient's body.

While we recognize that tariff provisions must be read with a view to future developments in technology, it must also be recognized that in some cases technological developments are so significant as to cross the line into an entirely new technology and we believe that this is the case with a CAT scanner by virtue of the function performed by the computer. In other words, we believe that where the computer function takes over to create the three dimensional image the X-ray function of the scanning gantry ends and thus we conclude that the basic CAT scanner system, viewed as a whole, constitutes "more than" an X-ray apparatus. We do not believe that the earlier Customs Service rulings cited by counsel require a different conclusion since none of the products dealt with

in those rulings incorporated a computer which manipulated or reconstructed data in the manner of the computer used in a CAT scanner.

Whether a CAT Scanner Is Different in Nature and Function From an Electromedical Apparatus

Counsel for the importer further argues that the kinds of articles which Congress intended to be covered by item 709.17, TSUS, and the kinds of articles which have been classified in that item by the Customs Service, are fundamentally different in function and nature from a CAT scanner. As concerns legislative history, counsel alleges that item 709.17, TSUS, was based on the wording of heading 90.17 of the Customs Co-operation Council Nomenclature (CCCN) and that item 709.63 was based on the text of CCCN heading 90.20; it is argued that the Explanatory Notes to CCCN heading 90.17 make clear that this heading does not cover a CAT scanner since a specific exclusion reference is made therein to "X-ray, etc. apparatus falling within heading 90.20" and, further, that none of the specific products mentioned as falling in CCCN heading 90.17 in any way makes use of X-rays. It is further stated that the same kinds of articles listed in CCCN Explanatory Note 90.17 (*e.g.*, electrocardiographs, electroencephalographs, electronic devices for measuring pulse rate, and automatic sphygmomanometers) have been classified by the Customs Service in item 709.17, TSUS. Finally, counsel draws a distinction between the operating principle of a CAT scanner on the one hand and electrocardiographs and electroencephalographs on the other hand, pointing out that while both use electricity as a power source the latter are specifically designed to measure electrical signals in the body which is not the case with a CAT scanner.

While we agree that under certain circumstances the CCCN may be considered as legislative history for provisions contained in the tariff schedules, we do not agree that the Explanatory Notes to CCCN heading 90.17 require the conclusion that a CAT scanner may not be classified as an electro-medical apparatus in item 709.17, TSUS. As concerns the exclusion reference in CCCN Explanatory Note 90.17, it should be noted that application of that exclusion to a specific product requires making a legal determination that the product at issue is in fact an X-ray apparatus of CCCN heading 90.20; since we have concluded that a CAT scanner is more than and X-ray apparatus it would not appear to fall in CCCN heading 90.20. Moreover, the fact that CAT scanners or other devices using X-rays are not mentioned in CCCN Explanatory Note 90.17 does not preclude their classification in that heading; if counsel's argument is valid, it could also be said that a CAT scanner cannot fall in CCCN heading 90.20 since a review of the Explanatory Notes to that heading failed to disclose any mention of CAT scanners or any other apparatus incorporating a computer as an essential constituent. Nor do we believe that the fact that certain

products classified by the Customs Service in item 709.17, TSUS, are also mentioned in CCCN Explanatory Note 90.17 is proof that CAT scanners may not be classified in item 709.17, TSUS: the CCCN Explantory Notes do not purport to describe every article falling within a specific heading and prior Customs Service rulings cannot be read to exclude from a tariff provision other products not considered in those rulings.

We are not in agreement with counsel's other arguments for excluding CAT scanners from item 709.17, TSUS. Although counsel makes specific reference to electrocardiographs and electroencephalographs as being designed to measure electrical signals in the body, we note that other products listed in the statistical subheadings under item 709.17 (*e.g.,* pacemakers and patient monitoring systems for temperature, blood pressure, and pulse) do not operate on such a principle. Since a CAT scanner is clearly a medical apparatus, it is only necessary to determine whether a CAT scanner is an electrical apparatus in order to fall within the term "electromedical apparatus." We believe that a CAT scanner is an electrical apparatus simply because it uses electricity as a power source, and in this regard we note that the court in the *Bosch* case, *supra,* stated as follows at page 104:

> Whereas the electrical action of making and breaking a circuit is the *sine qua non* which identifies and distinguishes "switches" in item 685.90, and operates to exclude switches which also perform a mechanical act, it does not necessarily follow that the word "electrical" similarly limits starting and ignition equipment. These articles may well be described as electrical, if, in fact, they operate by electricity though they are so designed as to be capable of performing one or more mechanical steps.

Whether Item 709.63, TSUS, Must Prevail Under the Rule of Relative Specificity

Counsel argues, finally, that item 709.63, TSUS, most specifically describes a CAT scanner, since the requirements of that provision are more difficult to satisfy than those of the provision covered by item 709.17, TSUS, and thus item 709.63 must prevail over item 709.17 under the rule of relative specificity. While we agree with counsel's general statement concerning the rule and its application vis-a-vis the two tariff provisions at issue, we note that this rule comes into play only when two competing tariff provisions otherwise equally apply to a particular product. Since we have concluded that the basic CAT scanner system is "more than" an X-ray apparatus and is not "based on" the use of X-rays, it cannot be classified in item 709.63, TSUS, and therefore the rule of relative specificity is not applicable in the present case.

A review of Headquarters files has disclosed the existence of the following earlier rulings in which products identical or very similar to the basic CAT scanner system involved herein were classified in

item 709.63, TSUS: file SP 431.4 ER 021804, September 19, 1972; file CLA-2 R:CV:S: SLC 431.4 031950, March 5, 1974; and file CON-5-03:R:CV:S SC 426.85 034917, August 7, 1974. Since those earlier rulings are not in accordance with the conclusion reached herein that a basic CAT scanner system is classifiable in item 709.17, TSUS, they should be modified to reflect the current view of the Customs Service pursuant to section 177.9(d), Customs Regulations.

As concerns the Independent Viewing System, we are of the opinion that the various components thereof do not exhibit sufficient functional interdependence to render the whole an entirety for tariff purposes. However, the magnetic tape phase decoder should be classified as an entirety with the diagnostic display console since the data transfer function of the decoder is essential to the function of the floppy disc unit incorporated in the diagnostic display console. Given that the basic scanner system is separately classifiable as other electro-medical apparatus and noting that the components of the Independent Viewing System do not incorporate an X-ray device, we are unable to agree that these components should be classified as X-ray apparatus and parts thereof in item 709.63, TSUS. The diagnostic display console and magnetic tape phase decoder should be classified under the provision for office machines not specially provided for, in item 676.30, TSUS. The magnetic tape unit should be classified under the provision for tape recorders, in item 685.40, TSUS. Since the 320 matrix option is a software package we agree with counsel that it should be classified under the provision for magnetic recordings, recorded on magnetic tape or on any medium other than wire, in item 724.40, TSUS. To the extent that the three rulings specifically mentioned above or any other prior rulings are inconsistent with the conclusions on classification reached in the present case, those prior rulings are hereby modified accordingly.

CONCLUSION

In view of the above, the protest should be allowed insofar as it relates to classification of the 320 matrix option in item 724.40, TSUS. The protest should be denied insofar as it relates to the classification of the basic scanner system, the diagnostic display console, the magnetic tape phase decoder and the magnetic tape unit. A copy of this decision should be attached to your Form 19 Notice of Action to be sent to the protestant. The protest file is enclosed.

(C.S.D. 83-38)

This ruling holds that merchandise shipped in bond through Canada and later exported from Canada to the United States is appraised under transaction value because the sale of the merchandise from the importer to the company represents the price actually paid for the merchandise when sold for exportation to the United States. (Section 152.23, Customs Regulations and TAA No. 57)

Dated: September 27, 1983
CLA-2 CO:R:CV:VS
071374 MK

Re: Application for Further Review of Protest No. 30042-000015, dated January 29, 1982

This protest was filed against your appraisement of a shipment of plywood imported at Blaine, Washington, under the following circumstances.

On September 26, 1980, (Company name) ordered the plywood from (Importer) (Location) at $275/MSF, X-dock, duty paid, Vancouver. (Imp) confirmed the order. On September 30, (Importer) ordered the plywood to cover (Co. name) order from a U.S. Company which in turn ordered the plywood from the related company in the Phillipines.

The plywood was exported from the Phillipines, destined for Vancouver, on January 5, 1981. On February 5, 1981, (Imp.) cancelled the plywood order from (Co. name) which has gone out of business.

On February 11, 1981, (Imp.) sold the plywood to (Co. name) (Location) at $298/MSF, X-dock, duty paid. The plywood was imported into Canada on February 13, in bond, and was exported to the United States on February 17 and February 20, 1981. You appraised it at $298 per MSF less brokerage, less duty.

The protestant agrees with us that the sale from (Imp.) to (Co. name) cannot represent transaction value because it was not a sale for exportation to the United States.

He contends that (Imp.) sale to (Co. name) was also not a sale for export to the United States because it took place on February 11, while the merchandise was still in transit and not physically in Canada. Even if the merchandise has landed in Canada prior to the sale to (Co. name) he contends that it still was not a sale for export to the United States because the merchandise never entered the Commerce of Canada. It did not clear Customs there, but was shipped in bond through Canada to the United States. He concludes that the basis of appraisement should be transaction value of indentical merchandise or, alternatively, deductive value.

The facts are clear that the merchandise was sold and shipped to Canada and unladed there, and was subsequently imported into the United States. There was no intent at the time of the original ship-

ment from the Phillipines to export the plywood to the United States. Thus, under section 152.23, Customs Regulations, Canada is the country of exportation for value purposes, and the question of whether or not the merchandise entered the commerce of Canada is irrelevant.

Transaction value, under section 402(b), is broadly defined as the price actually paid or payable for the merchandise when sold for exportation to the United States. Under TAA No. 57, when there are two or more transactions which might give rise to a transaction value, the phrase "* * * when sold for exportation to the United States * * *" refers to the transaction which most directly causes the merchandise to be exported to the United States.

In this case, the transaction which most directly cause the plywood to be exported to the United States was (Imp.) sale to (Co. name). In fact, that was the only sale of this plywood for exportation to the United States. Since that sale was acceptable for transaction value, there is no legal basis for resorting to transaction value of identical merchandise, or to deductive value.

For the foregoing reasons, you are directed to deny the protest in full. Please send the protestant a copy of this ruling with your notice of denial. Your file is returned.

(C.S.D 84-39)

Lamp filaments exported for fabrication by forming, shaping and annealing prior to assembly are not entitled to classification under item 807.00, TSUS. Item 806.20, TSUS, is also not applicable since shaping to new configuration and annealing are not considered repairs or alterations. Specially formed and annealed conducting filament wire is classifiable in item 688.43, TSUS, as electrical articles and electrical parts of articles

Date: September 30, 1983
File: CLA-2 CO:R:CV:VS
071451 EM

In your letter of June 2, 1983 (JS #83-0163), on behalf of (Company name) you asked for information about the tariff status of certain folded style lamp filaments, or coils, that are proposed for exportation to Mexico for certain operations to be performed thereon and returned to the United States.

A narrative description of the assembly process and accompanying photographs were submitted. An incandescent lamp filament, the coil, is wound from a straight length of tungsten wire. The filament raw material is a wound piece of tungsten wire about 4-6 inches long, that is exported for finishing into lamp filaments and used in Mexico in the assembly of lamp components. Upon completion in Mexico, the filament assemblies will be returned to the United States for sealing into final lamp configurations.

The filament or raw coil material is exported in a wound form and folded into further configurations abroad either in a hand fixture or by machine, depending upon the final use of the filament. After configuration, the coils are cleaned in a degreasing solvent to remove oils picked up in the folding mechanisms. The further-shaped filament wire segments are threaded over thin tungsten rods, with spacers placed between the filaments. The rods and coils are fitted with copper connectors at each end and connected to electrical connections in a stabilizer bottle filled with hydrogen. Electrical current is passed through the configured coils, heating them to an incandescent temperature. The purpose of the heating process is to remove impurities and to physically stabilize the coils in the newly formed configuration and prevent return to the original exported coil form.

Following the stabilization process, the configured coils are removed from the rods and end burrs are trimmed off. The filaments are then inspected and placed in inventory for use in further assembly operations in Mexico.

With respect to foreign assembly operations, item 807.00, Tariff Schedules of the United States (TSUS), provides that fabricated United States components, which are designed to be fitted with other components may be exported for an assembly process, with no operations performed thereon except the attachment of the components to form the imported merchandise.

The foreign operations of folding the raw coil material into newly desired configurations and subsequently annealing to strengthen and temper the metal into the final new shape, all done prior to assembly, appear to be additional substantial operations that are performed in preparation for the assembly. Incidental operations are those which are considered both minor in nature and could not be provided for in advance. However, the cumulative foreign operations performed on the exported raw coil forms are so substantial as to amount to a fabrication that advances the coil forms in value and condition and produces new properties and characteristics that did not exist at the time of exportation. Threading the coiled wire segments over the rods temporarily for the purpose of passing electrical current through the coils, appears to be more of a preparation for, and incidental to, the subsequent annealing process to stabilize the coils in their new configurations, since the coils are later removed from the rods.

As stated in *E. Dillingham, Inc. v. United States,* C.A.D. 1078, "the correct starting point for the application of item 807.00, TSUS, is the condition of the components as "exported" from the United States." Fabricating or non-assembly steps taken between the time of arrival abroad and the assembly merely show that the exported components were "not in condition ready for assembly without further fabrication."

Nor would item 806.20, TSUS, appear to be applicable should the raw coil material be exported for the purpose of shaping new configurations and annealing, and returned to the United States for assembly and sale. The alterations provision is not so broad as to include further processing steps performed abroad as part of the overall manufacture to obtain a completely manufactured product. The alterations provision anticipates the exportation of finished articles. See *Guardian Industries Corp. v. United States,* Slip Op. 82-4 (1982) and cases cited therein.

Further, if tungsten wire is imported in straight form in the described short lengths and coiled in the United States before being exported for further processing, the mere change from straight to wound coiled form amounts to little more than a preparation for exportation and subsequent processing. Winding alone is not such a change that results in the emergence of a new and different article of commerce, having a distinct name, character, or use different from that previously possessed by the imported wire. However, if the wire is imported in long lengths and cut to shorter lengths and wound to coil form, this might result in a new and different article of commerce.

With respect to classification, since there is no provision for parts of electric filament lamps under item 686.90, TSUS, we believe that the specially formed and annealed conducting filament wire returning to the United States for assembly, might be more appropriately classifiable under the provision for electrical articles and electrical parts of articles, not specially provided for, in item 688.43, TSUS, with duty at the rate of 4.7 percent ad valorem.

(C.S.D. 84-40)

This ruling holds that for the purposes of Headnote 2(b)(ii), Schedule 8, Part 5C, TSUS, certain steel tubing and casing entered temporarily free of duty under bond for processing into premium seamless oil country tubular goods and subsequently rejected, is valuable waste if disposed of by the processor as scrap at scrap prices

Date: October 15, 1983
File: CON-9-CO:R:CD:D
215687 L

Issue: Is certain steel tubing and casing, entered temporarily free of duty under bond under item 864.05, Tariff Schedules of the United States (TSUS), after the effective date of Public Law 96-609, and subsequently rejected for various abnormalities, "valuable waste" within the meaning of Headnote 2(b)(ii), Schedule 8, Part 5C, TSUS?

Facts: Certain unfinished tubing and casing is admitted temporarily free of duty under bond (TIB) for fabrication and exporta-

tion. Two types of tubing and casing are processed, described as follows:

1. Type one is a plain end square cut unfinished tube manufactured to the inquirer's chemistry specifications by various steel mills. The plain end tubes are then upset to (Company name) or (Co.) specifications, heat treated, quench and tempered to API 5A, 5AC, 5AX grade specifications, straightened, coated, and stencilled. The tubes are then shipped to the respective (Company name) or (Co.) plant for turning and boring, threading, hydrostatic testing, full length drifting and inspection by the inquirer's customer's independent inspection company prior to delivery.

2. Type two is an upset to grade tube. This means the tube was upset, heat treated to API 5A, 5AC, or 5AX grade specifications, straightened, coated, and inspected at the mill prior to importation. After importation, they are turned and bored, threaded, hydrostatically tested, and full-length drifted by (Company name) or (Co.), and inspected by the inquirer's customer's independent inspection company prior to delivery.

The above finished products are seamless oil country tubular goods said to be suitable for use only as oil or gas well tubing, and casing used exclusively in oil field production.

Tubing and casing may be rejected for a number of reasons, the most common of which are said to be the following:

1. Destructive testing, in that API requires one joint from each heat or one joint of every 200 joints of the same heat be tested to destruction.

2. Threading rejects, which are tubes which have defective upsets at the time of turning and boring.

3. Plant spoilage, where the plants make an error and overcut the turn and bore area or the threads.

4. Inspection rejects, discovered by the independent inspection company by means of electronic, ultrasonic, radiological, and similar testing equipment.

Inspection rejects are for failure to meet API specifications 5A, 5AC, and 5AX, and are broken into four major categories relating to physical characteristics of the pipe body, chemical characteristics, threads, and upsets.

Rejected tubing is color coded in conformance to tentative API Field Inspection Guidelines for new tubing and casing. Rejected tubing or casing is said to be easily recognized in the oilfield industry by both executives and roughnecks, and is referred to as "red bands."

Some rejects are repairable with minimal processing and these are repaired and sold. They are not considered rejects. However, with the rejects the subject of this ruling it is contended that the extent of remanufacture necessary to make them saleable would make it cheaper to remelt, extrude, and roll a new tubular than to try to reprocess rejects which might still fail inspection.

The inquirer has supplied prices for various sizes of Type one and Type two casing and tubing, threading prices, and inspection prices as well as price books. In addition, we have received informal estimates of the value of the rejected casing and tubing. We are also advised by the inquirer that contractual obligations do not permit use of rejected casing or tubing in oil field production.

Law and analysis: Public Law 96-609 amended Headnote 2(b)(ii) to Schedule 8, Part 5C, Tariff Schedules of the United States (TSUS), to provide that if any processing of merchandise admitted under item 864.05, TSUS, results in an article manufactured or produced in the United States all articles and valuable wastes will be exported or destroyed except that in lieu of the exportation or destruction of valuable wastes, duties may be tendered on such wastes at rates of duties in effect for such wastes at the time of importation.

The primary issue here is whether premium oil well tubing and casing which is rejected as unfit for that purpose is "valuable waste" within the meaning of Headnote 2(b)(ii) to Schedule 8, Part 5C, TSUS.

In general, merchandise is classifiable for duty purposes in its condition as imported. Headnote 2(b)(ii) provides that if processing of merchandise admitted under item 864.05, TSUS, results in articles and valuable wastes manufactured or produced in the United States, in lieu of the exportation or destruction of valuable wastes, duties may be tendered on such wastes at rates of duties in effect for such wastes at the time of importation.

In C.S.D. 82-109, the Customs Service concluded that "wastes" and "by-products" are not synonomous for the purposes of temporary importation under bond and that the term "articles" encompasses "by-products."

Subsequently, in a letter dated August 13, 1982 (214273), noting the practical difficulties often encountered in distinguishing between a by-product and a valuable waste, we adopted considerations similar to those observed in making that determination where drawback is concerned. The following significant elements were listed:

1. The nature of the material of which the residue is composed.
2. The value of the residue as compared to the value of the principal product and the raw material.
3. The use to which it is put.
4. Its status under the tariff law, if imported.
5. Whether it is a commodity recognized in commerce.
6. Whether it must be subjected to some process to make it saleable.

The nature of the rejected tubing and casing differs from good tubing and casing in that it is no longer suitable for its original purpose although it is still pipe or tube. The degree of difference may vary depending upon the defect and whether Type one tube,

which is not to API specification as imported, or Type two tube, which is to API specification as imported, is involved. Nevertheless, the rejected tubing and casing is not suited for its original purpose as premium oil well tubulars.

The value of the rejected tubing and casing is nominal. We have been informally advised that the value of one joint of a standard size and weight of pipe is approximately $450; if rejected and not suitable for remanufacture or repair, its value as scrap at current scrap prices is approximately $15.

So far as use is concerned, the rejected tubing is marked as rejected and it is stated that these marks are commonly understood and observed in the oil industry. We are also informed that contractual obligations with the supplier of the tubing or casing prohibit use of rejected tubing for its original purpose. We are also advised that the inquirer sells the rejected tubing and casing as scrap or junk to scrap dealers and does not sell it as tubing or casing.

The status of rejected tubing, if imported, we will discuss later.

In our opinion, finished tubing and casing, conforming to API grade specifications, is a commodity recognized in commerce and can be distinguished from other piping and tubing. The Tariff Schedules of the United States (TSUS), specifically provide for pipes and tubes conforming to the API specifications for oil well casing and tubing (see, generally, items 610.30–49, TSUS).

No further processing of the rejects is necessary to make them saleable as scrap. The rejects remain tubing albeit not premium tubing and, it would appear to us, may still be used in other applications where lesser grades are acceptable. The inquirer points out, however, that the rejects are sold as scrap at scrap metal prices to scrap dealers and are not sold as tube or casing.

With respect to the tariff status of the rejected tubing and casing, if imported directly, the issue is more difficult. In *Cheltenham Supply Corp. v. U.S.*, C.D. 3908 (1969), the court notes that ". . . the term 'waste' is a word of art with a meaning that has been developed by the courts in a series of cases covering a wide variety of merchandise." After further discussion, the court went on to say "[P]erhaps the most helpful expression of the tariff meaning of the term is found in *Harley Co. v. U.S.*, 14 Ct. Cust. Appls. 112, 115, T.D. 41644 (1926), where the Court of Customs Appeals stated that:

> In the tariff sense, waste is a term which includes manufactured articles which have become useless for the original purpose for which they were made and fit only for remanufacture into something else. It also includes refuse, surplus, and useless stuff resulting from manufacturing processes and commercially unfit, without remanufacture, for the purposes for which the original material was suitable and from which material such refuse, surplus, or unsought residuum was derived. The latter class of waste might be appropriately designated as new

> waste and includes such things as tangled spun thread, coal dust, broken or spoiled castings fit only for remanufacture.

After quoting the previous statements from the *Harley* case, the Court of Customs and Patent Appeals in *U.S. v. C. J. Tower & Sons,* C.A.D. 271 (1944), noted that 'there are two kinds of waste; namely, one, a manufactured article which, because of use or otherwise, has become useless for the purpose for which it was designed and is fit only for remanufacture; and, two, so-called "new waste," which is refuse material resulting from a manufacturing process and which is commercially unfit without remanufacture for the purpose for which the original material was suitable.' Subsequent cases have adopted and have relied heavily upon the definitions set forth in the *Harley* and *C. J. Tower & Sons* cases."

The requirement of remanufacture for "old waste" was removed in *David Studner et al. v. U.S.,* C.D. 3865, affirmed C.A.D. 990. The requirement of remanufacture had been removed previously for "new waste." *Cia Algodonera v. U.S.,* 23 C.C.P.A. 42, T.D. 47686 (1935), *National Carloading Corp. v. U.S.,* 22 Cust., Ct. 328, Abs. 53220 (1949).

In *C. J. Tower & Sons of Buffalo, Inc. v. U.S.,* C.D. 2638 (1966), plied nylon yarn, because of certain defects, was claimed to be "waste." The defects consisted of oil spots, overply, drop or underply, undertwist or overtwist.

After discussing the common meanings of both "yarn" and "waste" and considering the testimony concerning the character and susceptibility for use of the merchandise, the court held it was not "waste," stating:

> We are of the opinion that, although the merchandise involved herein does have certain defects such as oil spots, overply or underply or overtwist, it is adaptable for use in textile operations without further conversion. Since the merchandise was classified as yarn and the record establishes affirmatively that the imported merchandise is adaptable for use in textile operations without further conversion, we are of the opinion that it falls within the common meaning of the term 'yarn,' and plaintiff has failed to overcome the presumption of correctness attaching to the classification of the collector. Accordingly, the imported merchandise is within the common meaning of the term 'yarn' for tariff purposes.

It would appear, although we do not so rule, that rejected Type one tube (plain end square cut unfinished tube), if imported, would still be classifiable as tubing or casing. Type two (upset to grade tube), if imported and defective in grade specification (*e.g.* not to API specification), would not be classifiable as tubing or casing meeting certain specifications, but would still be classifiable as tubing or casing in the appropriate provision.

We are satisfied, however, that the rejected tubing and casing here is not suitable for its original and intended use as premium

oil field tubing and casing and is not commercially marketable as such. We are satisfied that the rejected tubing and casing, when sold as waste or scrap at scrap prices, is valuable waste within the intendment of Headnote 2(b)(ii) of Schedule 8, Part 5C, TSUS.

We note in C.S.D. 82-96 that certain substandard devices for which a secondary market existed were held to constitute merely different types or brands of the same product for drawback purposes and thus to be eligible for drawback under the particular circumstances of that case. The subject tubing and casing are distinguishable from the articles in C.S.D. 82-96 in that while rejected tubing and casing may have the same form as good tubing and casing its identity, characteristics, and classification under the TSUS is different, *e.g.* good tubing and casing is to API specification, rejected tubing is not. Accordingly, as stated in C.S.D. 80-137, drawback is not allowable on valuable waste incurred in manufacture.

Holding: Certain steel tubing and casing, imported temporarily free of duty under bond for processing into what is described as premium seamless oil country tubular goods, if rejected subsequent to processing for reasons which make it unsuitable for its original use, is valuable waste within the meaning of Headnote 2(b)(ii) to Schedule 8, Part 5C, TSUS, if disposed of by the processor as scrap at scrap prices.

(C.S.D 84-41)

This ruling holds that a cyclocomputer that is designed to provide cycling information on trip distance, elapsed time and speed does not meet the requirements of Schedule 7, Part 2, Subpart D, Headnote 2, TSUS. The cyclocomputer is classifiable on the basis of its primary design and construction, even though it is capable of performing other auxiliary or incidental operations. The cyclocomputer is classified as a speedometer under item 711.93, TSUS because the primary function of the cyclocomputer is to function as a speedometer

Date: October 17, 1983
File: CLA-2 CO:R:CV:VS
071022 SC

We have your letter of October 18, 1982, together with enclosures, in which you request a reconsideration of the tariff classification of a cyclocomputer, the subject of our letter 067855 of June 28, 1982. A sample was also submitted for our examination.

The merchandise is described as the Cateye-Velo CC-1000 Cyclocomputer. Descriptive literature indicates that the device is a microcomputer-based instrument designed to provide cycling information on trip distance, elapsed time, and speed. Unlike a mechanical speedometer, it uses a magnetic contactless sensor which does

not add any resistance to the pedaling action. It appears to be chiefly used on bicycles.

It is your view that the cyclocomputer is more than a bicycle speedometer and that it should be classifiable under the provision for electrical measuring, checking, analyzing, or automatically-controlling instruments and apparatus in item 712.49, Tariff Schedules of the United States (TSUS), rather than as a bicycle speedometer in item 711.93, TSUS.

Schedule 7, Part 2, Subpart D, Headnote 2, TSUS, provides in part,

* * * * * * *

> (2) For the purposes of this subpart the provisions herein (items 712.05 through 712.52, inclusive) for "electrical measuring, checking, analyzing, or automatically-controlling instruments and apparatus" apply only to the following articles:
>
> (a) Appliances, instruments, apparatus, or machines of the kinds described in Subpart C of this part or in the provisions of this subpart (subpart D) covered by items 711.04 to 711.88, inclusive, the operation of which depends on an electrical phenomenon which varies according to the factor to be ascertained or automatically controlled.

You state that the magnetic contactless sensor detects revolutions of the wheel. As the wheel rotates, each magnet in the sensor ring passes the sensor, creating a varying electrical voltage. You further state that the rotation of the front wheel produces a signal which is punctuated by a series of voltage spikes. You then indicate that the cyclocomputer measures, checks, and analyzes data collected by the sensors which transmit a varying electrical voltage signal to the microcomputer. In its operation, however, the cyclocomputer's microprocessor merely counts the signals from the magnetic sensor. The signal varies, but the variance is of no consequence. The distance traveled is determined by the number of complete revolutions of the wheel. The position of the mounting sensor ring and the mounting sensor remains fixed. Their relation to the circumference of the wheel remains constant. Only the speed varies. Speed and time are also related. A speedometer measures miles per hour. We conclude that the subject merchandise does not meet the requirements of Schedule 7, Part 2, Subpart D, Headnote 2, TSUS.

A solid-state timekeeping mechanism is also incorporated in the cyclocomputer, and for classification purposes under TSUS, the clock portion would be constructively segregated from the remainder of the article. However, in view of the decision in the *United States v. Texas Instruments,* Slip Op. 81-23, aff'd in appl. No. 81-23, holding that solid-state time pieces do not have a movement for purposes of the tariff schedules, it is our opinion that the time portion is an entirety with the cyclocomputer, subject to duty at the same rate as the computer.

It is a rule of judicial construction affecting tariff terms that an item which is "more than" a certain article cannot fall within the *eo nomine* provision for such article. *Servo-Tek Products Co., v. United States,* 57 CCPA 13, C.A.D. 969 (1969). Merchandise, however, is classifiable on the basis of its primary design and construction, even though it is capable of performing other auxiliary or incidental operations. *Durst Industries, Inc. v. United States,* C.D. 4568. In order to determine if an article is more than that provided for in a particular tariff provision, it is necessary to ascertain the common meaning of the tariff provision and compare it with the merchandise in issue. *E. Green & Son (New York), Inc. v. United States,* 59 CCPA 31, 34 C.A.D. 1032. In the instant case, the primary purpose of the cyclocomputer is to function as a speedometer. All functions of the device are related. We think that the merchandise is a speedometer.

Accordingly, after a painstaking review, we must conclude that the merchandise in question is properly classifiable as a bicycle speedometer under item 711.93, TSUS, within the common meaning of the term.

(C.S.D. 84-42)

This ruling holds that under section 10.112, Customs Regulations, documents may be filed at any time prior to the liquidation of the entry, or if the entry is liquidated before the entry becomes final. A liquidation is considered to become final after 90 days. However, notwithstanding that a liquidation may have become final, appropriate relief can be allowed under section 520(c)(1), if a timely request is filed and the claim is allowed. (19 U.S.C. 1520(c)(1), CR 10.173(a)(3))

Date: October 25, 1983
File: PRO-1-02 CO:R:E:E
722553 BLS

This is in reference to the above-captioned matter, filed through the Customs Information Exchange, involving a request for reliquidation under section 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)).

The record shows that the merchandise was entered duty-free as American Goods Returned on December 2, 1981, and a bond was given for the production of a document to support the duty-free entry. The missing document was not submitted within the six month bond period and several weeks later, on June 25, 1982, the entry was liquidated as dutiable. On October 1, 1982, more than 90 days after the date of liquidation, the importer submitted the missing document and filed a claim requesting relief under section 520(c)(1). The basis for such claim was that the appropriate document had not been received timely due to a clerical error.

By notice dated October 27, 1982, the claim was denied for the reason that "* * * failure to produce (the) required document within six months after date of entry and 90 days after liquidation does not constitute a clerical error."

Pursuant to the instant protest, the importer requests relief inasmuch as the documentation supporting the duty-free entry is now submitted. You believe the protest should be denied for the reason that the failure to produce the required document within six months from the date of liquidation does not constitute a "clerical error" correctible under section 520(c)(1). While your decision was based on C.S.D. 81-200, you believe that this decision appears to be in conflict with Headquarters Letter Ruling 304210 (undated).

Section 520(c)(1) provides in part that an entry may be reliquidated to correct a clerical error, mistake of fact, or inadvertence, not amounting to an error in the construction of a law, if the claim is made within one year from the date of liquidation or exaction.

Section 10.112, Customs Regulations, provides in pertinent part the following:

> Whenever a free entry or a reduced duty document * * * required to be filed in connection with the entry is not filed at the time of entry or within the period for which a bond was filed for its production, but failure to file it was not due to willful negligence or fraudulent intent, such document * * * may be filed at any time prior to the liquidation of the entry, *or if the entry was liquidated, before the entry becomes final* * * * (Emphasis added).

In Headquarters Letter Ruling 304210, the document supporting the free entry (C.F. 3311) was not submitted within the six month bond period, and the entry was liquidated as dutiable. One week after liquidation, the broker requested reliquidation under section 520(c)(1) and also requested a waiver of the C.F. 3311. (A request for a waiver had been made prior to liquidation, but at that time Customs made no response.) The request was denied for failure to produce the C.F. 3311. The C.F. 3311 was finally submitted in acceptable form more than 90 days after the date of liquidation. Customs then denied the request for reliquidation because "the document was not timely filed."

Citing *United States* v. *C. J. Tower & Son of Buffalo, Inc.*, C.A.D. 1129 (1974), we pointed out in part that although most liquidations are final 90 days after the date of liquidation, a liquidation is not final if a timely claim for reliquidation is filed under section 520(c)(1). (Such claim must be filed within one year from the date of liquidation or exaction.) Thus, the request for reliquidation cannot be denied merely because the free-entry document was not produced within the six month bond period.

However, while a section 520(c)(1) claim may be timely filed, the missing document cannot be accepted if the failure to file it within the prescribed bond period was due to willful negligence or fraudu-

lent intent. (See section 10.112, Customs Regulations, supra.) Furthermore, the substantive requirements of section 520(c)(1) must be satisfied, i.e., the protestant must establish that there was an error, mistake of fact, or inadvertence not amounting to an error in the construction of a law. Headquarters did not address that issue in Letter Ruling 304210 since it was only faced with the timeliness of the claim.

In C.S.D. 81-200, dated March 17, 1981, the missing document was G.S.P. Form A. The applicable regulation (section 10.173(a)(3)) provides in pertinent part that the district director may allow production of the document within 60 days or an additional period, but only for good cause shown. Thereafter, the entry shall be treated as dutiable.

The duty-free entry was filed on June 14, 1978, without the required Form A. A bond was posted for production of the document and no duty was paid. After an error was made liquidating the entry as non-dutiable, the entry was liquidated as dutiable on September, 21, 1978. On August 1, 1979, within one year from the date of liquidation, Form A was submitted along with a letter requesting a refund of duties. The district director denied a refund on the grounds that the failure of the importer "to notify Customs of (his) intent to secure the necessary Form A within 90 days of the entry's reliquidation constituted negligence that precluded reliquidation under section 520(c) * * *"

In that case, we agreed with the district director that section 520(c)(1) was not available for relief. We noted that the importer had the burden of establishing that "good cause" existed for extending the 60 day period for submitting the Form A, that the burden had not been met, and that it was not until October 5, 1978, well beyond the 60 day period and after reliquidation, that any time extension may have been requested. Accordingly, we held that the reliquidation was not in error and that as a result section 520(c)(1), though timely filed, was inapplicable.

Thus, these two decisions involve different issues and we find no conflict between them. However, it appears that a clarification of the two cases with regard to certain language concerning the finality of a liquidation, in the context of a section 520(c) claim, may be helpful.

Under applicable statute, a liquidation is considered to become final after 90 days. However, notwithstanding a liquidation may have become "final", appropriate relief can be allowed under section 520(c)(1) if a timely request is filed and the claim is allowed. We would emphasize that the mere filing of a claim under section 520(c)(1) does not mean that the otherwise final liquidation has suddenly become "unfinal". Rather the claim must be meritorious for the "finality" of the liquidation to be affected.

With regard to the instant protest, we find that although the section 520(c)(1) claim was timely filed, the mere statement that the

failure to file the document (within the bond period) was due to clerical error is insufficient to satisfy the requirements of the statute. Protestant has not submitted any evidence supporting the claim that a clerical error was in fact made resulting in the failure to file the document timely.

Under the circumstances, you are directed to deny the protest.

(C.S.D. 84-43)

This ruling holds that the burial of radioactive scrap pieces of a Fine Motor Control Rod Drive constitutes destruction in lieu of exportation for purposes of TIB cancellation pursuant to 19 U.S.C. 1557(c).

Date: December 1, 1983
File: BON-1-CO:R:CD:D
216314 SMC

Issue: Whether a Fine Motion Control Rod Drive (FMCRD) imported under TIB is considered destroyed for purposes of 19 U.S.C. 1557(c) when it is cut into several pieces and disposed of by burial as radioactive waste.

Facts: One FMCRD, a device used inside the active fuel core of a nuclear power reactor, is to be imported for testing under item 864.30, TSUS. It will be installed for one 15-18 month operating cycle in order to obtain actual plant operational performance data. Upon the removal of the FMCRD at the end of the test period, it will be highly radioactive and because of this fact, non-exportable. The FMCRD will be cut into pieces and disposed of as radioactive waste in an authorized U.S. radioactive material disposal site by burial. The saw cuts, which may be witnessed by Customs, will render the FMCRD completely useless. Further, since no other FMCRD exists in the United States, no useful purpose would be served in an attempt to recycle any parts or portion of the FMCRD. The prospective importer requests a determination whether the foregoing proposal constitutes destruction in lieu of exportation for purposes of TIB cancellation.

Law and analysis: Headnote 1(a) to Subpart C, Part 5, Schedule 8, Tariff Schedules of the United States, provides in part that articles described in the provisions of that subpart, where not imported for sale or sale on approval, may be admitted into the United States without the payment of duty, under bond for their exportation within 1-year from the date of importation, which period, in the discretion of the Secretary of the Treasury, may be extended, upon application, for one or more further periods which, when added to the initial 1-year period, shall not exceed a total of 3 years.

Title 19, United States Code, section 1557(c), provides in part that merchandise entered under bond, under any provision of law, may

be destroyed under Customs supervision at the request and at the expense of the consignee, in lieu of exportation.

In the case of *American Gas Accumulator Co. v. United States,* T.D. 43642, 56 Treas. Dec. 368 (1929), the Customs Court held that for the purpose of cancelling temporary importation bonds, the term "destroyed" means that the articles imported no longer are articles of commerce. "In other words, if articles were destroyed to such an extent that they were only valuable in commerce as old scrap they still would be articles of commerce to which duty attaches upon importation, and therefore, could not be said to have been destroyed." In view of this we have held that scrap could be considered destroyed as an article of commerce, by burying it, under Customs supervision, in a landfill, such that the cost of extracting the scrap would exceed its value. It has also been held that "destroyed under Customs supervision" does not require on site observation of the destruction by Customs but does require the opportunity to observe the destruction. See C.S.D. 82-128.

Holding: The burial of radioactive scrap pieces of an FMCRD constitutes a destruction in lieu of exportation for purposes of TIB cancellation pursuant to 19 U.S.C. 1557(c).

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 134

Country of Origin Marking of Imported Rotary Metal Cutting Tools

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed change of practice in country of origin marking; solicitation of comments.

SUMMARY: Customs current practice exempts imported rotary metal cutting tools from being individually marked with the country of origin provided such tools reach ultimate purchasers in the United States in individual tubes or containers which are properly marked.

Customs has been requested to change its practice to require that each tool be marked individually because unmarked foreign-made tools are reaching ultimate purchasers without properly marked containers.

Because this matter is of sufficient importance to involve the interests of the domestic industry, this notice invites public comments on it before any change is made.

DATE: Comments must be received on or before June 25, 1984.

ADDRESS: Comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harold Loring, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, (202-566-5765).

SUPPLEMENTARY INFORMATION:

Background

Section 304, Tariff Act of 1930, as amended, (19 U.S.C. 1304), provides that all articles of foreign origin, or their containers, imported into the United States, shall be legibly and conspicuously

marked to indicate the English name of the country of origin to an ultimate purchaser in the United States, unless specifically exempted. Part 134, Customs Regulations (19 CFR Part 134), sets forth the country of origin marking requirements of 19 U.S.C. 1304.

By Treasury Decision 74-122, published in the Federal Register on April 15, 1974 (39 FR 13538), Customs required that imported rotary metal cutting tools (i.e., interchangeable tools for hand or machine tools such as drill bits and twist drills of the kind classifiable in items 649.43, 649.44, and 649.46, Tariff Schedules of the United States) (19 U.S.C. 1202) must be marked by means of die stamping in a contrasting color, by raised lettering, by engraving, or by some other method of producing a legible, conspicuous, and permanent mark to clearly indicate the country of origin. However, the decision further stated that if the containers or individual tubes of the tools were properly marked and would reach the ultimate purchaser with the tool contained therein, then the tool itself could be exempted from individual marking.

Two trade associations representing the domestic industry have requested that Customs abolish this exception and require that each metal tool be individually marked. It is suggested that only tools too small to be marked be exempted from marking and that certification requirements be applied in those cases. This request is based on both the contention that there exists a consumer preference for domestic tools and on submitted proof that unmarked tools are reaching ultimate purchasers with their foreign source undisclosed. The domestic industry claims that the country of origin marking requirements of these tools are circumvented by importers not selling directly to the ultimate purchasers, but rather to distributors who often remove the tools from their individual containers or tubes. In some cases it is alleged that these tools are repackaged in order to conceal the country of origin from the ultimate purchaser. Concealing the tool's country of origin defeats the legislative purpose of 19 U.S.C. 1304 which is to enable the ultimate purchaser of the goods to decide for himself whether or not to buy foreign-made articles. In view of the concerns of the domestic industry, Customs has determined that a review of this matter is warranted.

AUTHORITY

Because the change of practice, if implemented, would result in a restriction in the distribution of rotary metal cutting tools to ultimate consumers, Customs is giving interested parties notice and an opportunity to comment in accordance with section 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2).

COMMENTS

Consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will

be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Commissioner of Customs.

Approved: April 6, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 25, 1984 (49 FR 17772)]

(19 CFR Part 4)

Proposed Customs Regulations Amendments Relating to Passengers on Foreign Vessels Taken on Board and Landed in the United States

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: Customs is considering amending its regulations relating to the transportation of passengers by a foreign vessel between ports or places in the United States, either directly or by way of a foreign port. The proposed amendment would provide that, with certain exceptions, such transportation is prohibited when passengers are actually embarked at one port or place in the United States and disembarked at another port or place in the United States. This proposal would more accurately reflect the scope and intent of the coastwise trade passenger statute which contains no provision for exceptions based upon the number of hours a vessel is in port, such as is provided in the current regulation. The prohibition would not apply when passengers are so transported between such ports or places on a voyage touching foreign ports other than nearby foreign ports. The proposed amendment would simplify the administration of the statute for Customs, be of benefit to the economy of certain of the American coastwise ports affected, and in no way erode the statutory protection given to American vessels engaged solely in domestic trade.

This notice invites public comment with respect to the merits of this proposal.

DATE: Comments must be received on or before June 25, 1984.

ADDRESS: Comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Edward B. Gable, Jr., Director, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5732).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title 46, United States Code, section 289 provides that no foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of $200 for each passenger so transported and landed.

Section 4.80a(a)(2), Customs Regulations (19 CFR 4.80a(a)(2)), provides that a foreign vessel which takes a passenger on board at a port in the United States, its territories, or possessions embraced within the coastwise laws ("coastwise port") will be deemed to have landed that passenger in violation of the coastwise laws (46 U.S.C. 289): (1) if the passenger goes ashore, even temporarily, at another coastwise port on a voyage to one or more coastwise ports but touching at a "nearby foreign port or ports" (as defined in section 4.80a(c), Customs Regulations (19 CFR 4.80a(c)), but at no other foreign port, and (2) if during the course of the voyage the vessel remains in the coastwise port (not including the port of embarkation) for more than 24 hours, without regard to whether the passenger ultimately severs his connection with the vessel at the port at which he embarked. The 24-hour rule of section 4.80a(a)(2) does not apply to a trip on which the vessel would at some time touch at a port other than a "nearby foreign port," for example, a port in Europe or in South America.

The essence of the 24-hour rule was originally stated in T.D. 55147(19) of June 3, 1960 (95 Treasury Decisions 297), because it was believed at that time that it was necessary to implement a workable administrative rule of interpretation by which to effectively and efficiently ascertain violations of the coastwise passenger statute, (46 U.S.C. 289).

Customs has been advised that certain American coastwise ports, such as those in Alaska, Florida, and Puerto Rico, are placed in a disadvantageous position in their competition with nearby foreign ports for tourist business due to present section 4.80a(a)(2) and that the net result is to hurt the economy of these American ports by depriving them of revenue. It has been recommended that the 24-hour limit be extended to permit foreign-flag vessels from U.S.

ports to be able to land passengers at other U.S. ports for longer periods.

The references in section 4.80a(a)(2) to a 24-hour rule and nearby foreign ports are the result of attempts by Customs to apply an Attorney General's opinion dated February 26, 1910 (28 O.A.G. 204). In that case, a foreign-flag vessel transported 615 passengers between New York and San Francisco. However, the Attorney General stated that since the passengers were so transported on a cruise around the world, the primary object of the passengers was to visit various parts of the world on a pleasure tour and then return home via California, not to be transported in domestic commerce, and therefore the transportation was not in violation of 46 U.S.C. 289.

The 24-hour rule was extended to voyages touching at foreign ports other than nearby foreign ports, as defined in section 4.80a(c), Customs Regulations, by Treasury Decision 68-285 (33 FR 16558, dated November 14, 1968). On the other hand, voyages solely to one or more coastwise ports have always been considered predominantly coastwise in their nature and object and therefor passengers on such a voyage temporarily going ashore at a coastwise port other than their port of embarkation have been deemed to have been disembarked in violation of the statute. An example of such a voyage would be one including only coastwise ports in California and Hawaii.

Customs is considering an amendment of section 4.80a(a) which would state:

> No foreign vessel shall transport a passenger between ports or places in the United States, its territories, or possessions embraced within the coastwise laws ("coastwise ports"), either directly or by way of a foreign port, except for a passenger so transported on a vessel that takes the passenger on a voyage to a foreign port other than a nearby foreign port. The prohibition on transportation of a passenger under this regulation is limited to a passenger embarked on the foreign vessel at a coastwise port and disembarked from the foreign vessel at a different coastwise port. Except for a voyage solely to one or more coastwise ports, going ashore temporarily at a coastwise port and then going back on board the vessel and departing with it when it leaves the port or place is not considered embarking or disembarking. However, a voyage solely to one or more coastwise ports is predominantly coastwise in its nature and object and therefore a passenger on such a voyage temporarily going ashore at a coastwise port other than the port of embarkation is deemed to have been disembarked in violation of the statute.

The terms "embarks" and "disembarks" are trade words of art which normally mean going on board a vessel for the duration of a specific voyage and leaving a vessel at the conclusion of a specific voyage. In this normal context the words do not contemplate tem-

porary shore leave for any specified number of hours during a voyage. It is believed that the use of the terms in the proposal will follow the intent of Congress and clarify the scope of the regulation. That the statutory language "so transported and landed" means the final and permanent disembarking is further shown by four Attorney General Opinions as follows:

1. 28 O.A.G. 204, dated February 26, 1910, citing a statement by the Chairman of the interested House Committee at the time that the legislation relates to "the conveyance of passengers between ports of the United States";

2. 29 O.A.G. 318, dated February 12, 1912, stating that the words of the statute "imply a transportation beginning at one port or place in the United States and ending at another port therein";

3. 30 O.A.G. 44, dated February 1, 1913, covering the application of the statute to passengers joining a vessel in a port of the United States and "disembarking at the port of New York" and referring to the passengers' "ultimate destination, New York, and landed there"; and

4. 36 O.A.G. 352, dated August 13, 1930, covering the application of the statute to passengers on a vessel which "would transport them from San Francisco to Honolulu" even though the passengers "later embarked" on another vessel for a foreign country.

Any Treasury Decisions or other administrative precedents contrary to such a new regulation, such as the above-mentioned T.D. 55147(19) and T.D. 55193(2) (which prohibits the operation of foreign-built vessels for offshore fishing parties for hire even if passengers are not in fact transported between United States points), would no longer be applied.

This notice invites public comment with respect to the merits of this proposal before any further action is taken.

Executive Order 12291 and Regulatory Flexibility Act

It has not been determined whether the contemplated change, if adopted: will result in a regulation which is a "major rule" as defined by section 1(b) of E.O. 12291 and thus require a regulatory impact analysis; and will have a significant economic impact on a substantial number of small entities, and thus require an initial regulatory flexibility analysis in accordance with section 3 of the Regulatory Flexibility Act (5 U.S.C. 603). However, if it is decided to proceed with this matter, the notice of proposed rulemaking will either contain the analyses or a statement and certification that the analyses are not required.

Comments

In order to assist Customs in determining if we should proceed with this proposal, written comments are invited. Consideration will be given to any comments that are submitted timely to the Commissioner of Customs. Comments will be available for public

inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This document is issued under the authority of R.S. 251, as amended (19 U.S.C. 66); sections 2, 3, 23 Stat. 118, as amended, 119, as amended (46 U.S.C. 2, 3); section 624, 46 Stat. 759 (19 U.S.C. 1624).

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: April 6, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 25, 1984 (49 FR 17769)]

---

19 CFR Part 12

Proposed Customs Regulations Amendment Relating To Honeybees and Honeybee Semen

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations relating to honeybees and honeybee semen. The proposed amendment is part of a joint Department of Agriculture-Treasury proposal to revise current regulations to reflect amendments to the Honeybee Act. If adopted, this amendment would allow Treasury, through Customs, and in conjunction with Agriculture, through the Animal and Plant Health Inspection Service, to enforce the provisions of the Honeybee Act which now regulates not only the importation of honeybee but also honeybee semen.

DATES: Written comments must be received on or before (60 days after publication in the Federal Register).

ADDRESS: Comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control

Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harrison C. Feese, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8651).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 12.32, Customs Regulations (19 CFR 12.32), currently provides that honeybees may be imported into the United States by the Department of Agriculture for experimental or scientific purposes. Importation of honeybees for any other purpose is prohibited unless the Secretary of Agriculture has determined that the importation is from a country in which no diseases dangerous to honeybees exist. Section 12.32 additionally states that the importation of honeybees is to be governed by joint regulations of the Secretary of Agriculture and the Secretary of the Treasury.

The current Customs Regulations set forth in 19 CFR 12.32 and the U.S. Department of Agriculture (USDA) regulations set forth in 7 CFR Part 322, pertaining to the importation of honeybees, reflect the provisions of the Honeybee Act (7 U.S.C. 281 *et seq.*), before it was amended in 1976 by Pub. L. 94-319. The amended Honeybee Act now regulates not only the importation of honeybees, but also honeybee semen.

In a document published by the USDA in this issue of the Federal Register, a proposal is set forth to revise current Agriculture regulations to reflect amendments to the Honeybee Act. The amended Honeybee Act provides that honeybees may be imported into the United States by the USDA for experimental or scientific purposes. Proposed criteria for the importation of honeybees and honeybee semen are set forth as well. The Honeybee Act further allows honeybee and honeybee semen to be imported under such rules and regulations as the Secretary of Agriculture and the Secretary of the Treasury shall prescribe. These joint regulations are enforced by Treasury, through Customs, and in conjuction with the Animal and Plant Health Inspection Service of the USDA.

So that the Customs Regulations conform with those of USDA, Customs is proposing an amendment to section 12.32 to regulate not only the importation of honeybees, but also honeybee semen.

Section 12.32, as amended, would provide that honeybee semen may be imported into the United States only from countries determined by the Secretary of Agriculture to be free of undesirable honeybees, and which take adequate precautions to prevent the importation of undesirable honeybee and their semen.

EXECUTIVE ORDER 12291

Because this document will not result in a regulation which would be a "major" rule as defined by section 1(b) of E.O. 12291, a regulatory impact analysis and review as prescribed by section 3 of the E.O. is not required.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis are not applicable to the proposal because the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Bees.

PROPOSED AMENDMENTS

PART 12—SPECIAL CLASSES OF MERCHANDISE

It is proposed to revise section 12.32, Customs Regulations (19 CFR 12.32), to read as follows:

12.32 Honeybees and Honeybee Semen.

(a) Honeybees from any country may be imported into the United States by the Department of Agriculture for experimental or scientific purposes. All other importations of honeybees are prohibited except those from a country which the Secretary of Agriculture has determined to be free of diseases dangerous to honeybees.[19]

(b) Honeybee semen may be imported into the United States only from countries determined by the Secretary of Agriculture to be free of undesirable honeybees, and which take adequate precautions to prevent the importation of undesirable honeybees and their semen.

(c) The importation of honeybees and honeybee semen is governed by joint regulations of the Secretary of Agriculture and the Secretary of the Treasury published in Treasury Decisions and the Federal Register from time to time.

AUTHORITY

These changes are proposed under authority of R.S. 251, as amended; sec. 1, 42 Stat. 833, as amended; 90 Stat. 709; sec. 624, 46 Stat. 759, (7 U.S.C. 281, 19 U.S.C. 66, 1624).

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: January 12, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April ?, 1984 (49 FR ??)]

---

19 CFR Part 101

Proposed Change in the Customs Service Field Organization—Duluth and Milwaukee

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to change the field organization of the Customs Service by consolidating the Customs districts of Duluth, Minnesota, and Milwaukee, Wisconsin, under the Minneapolis, Minnesota, Customs district and by placing the Duluth and Milwaukee ports of entry under the enlarged Minneapolis district. The change is being proposed to benefit both Customs and the importing community by reducing administrative salaries and expenses, without reducing services to the general public.

DATE: Comments must be received on or before June 25, 1984.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Renee DeAtley, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-9425).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to continue to provide service to carriers, importers, and the public, Customs proposes to consolidate the Customs districts of Duluth, Minnesota, and Milwaukee, Wisconsin, under the Minneapolis, Minnesota, Customs district and to consolidate the Duluth and Milwaukee ports of entry within the enlarged Minneapolis district.

Customs has conducted several surveys of staffing and workload for the Duluth and Milwaukee districts in the last few years. Based on the findings of these surveys, Customs is of the opinion that the workload and manpower requirements of the Duluth and Milwaukee districts do not warrant separate district organizations. Customs believes that consolidation of these districts under the Minneapolis district will result in a more economical and efficient use of its personnel and resources in carrying out the Customs mission. As a result of a reduction in administrative salaries and expenses there would be a savings in excess of $250,000 each year. However, there would be no reduction in Customs service to the general public or to those organizations conducting business in the Duluth and Milwaukee districts. In addition, Customs would be able to continue to meet the present needs and growth potential of the geographical areas affected.

It should be noted that customhouse brokers currently licensed to transact business in the Duluth and Milwaukee districts also would be considered licensed in Minneapolis. Likewise, those customhouse brokers currently licensed to transact business in Minneapolis also could do business in the ports of Duluth or Milwaukee. Thus, licensed customhouse brokers will be allowed to transact business interchangeably in Minneapolis-Duluth-Milwaukee.

The proposed consolidation would place the Duluth and Milwaukee ports of entry under the Minneapolis district. Also, the ports of entry currently under the jurisdiction of the Duluth and Milwaukee districts would be placed under the Minneapolis district. The new Minneapolis district would include the States of Wisconsin and Minnesota, except for those Minnesota counties (Kittson, Roseau, Lake of the Woods, Marshall, Beltrami, Polk, Red Lake, and Pennington), in the Pembina, North Dakota Customs District.

The following ports of entry would be included in the Minneapolis District:

Minneapolis-St. Paul, Grand Portage, and International Falls-Ranier, in the State of Minnesota, and Ashland, Milwaukee, Green Bay, Manitowoc, Marinette, Racine, and Sheboygan in the State of Wisconsin, and the consolidated ports of Duluth, Minnesota, and Superior, Wisconsin.

Also, the Customs station of Crane Lake, Minnesota, would be under the Minneapolis district office.

If the proposed change is adopted, the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), would be amended accordingly.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This change is proposed under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

EXECUTIVE ORDER 12291

Because this proposal relates to the organization of the Customs Service, pursuant to section 1(a)(3) of Executive Order 12291, this document is not subject to that Executive Order.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this proposal. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some small entities in the areas involved, it is not expected to be significant because the consolidation of Customs ports of entry in other locations has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was James S. Demb, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: April 6, 1984.

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 25, 1984 (49 FR 17771)]

U.S. Customs Service

General Notice

19 CFR Part 177

Country of Origin Marking Requirements for Audio Cassette Shells

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Withdrawal of notice of proposed change of position.

SUMMARY: This document advises the public that Customs has decided to continue its current position of excepting imported audio cassette shells from the requirement of country of origin marking. The proposed change of position, which would have required that the merchandise be marked to identify the country of origin, has not been adopted. After analysis of the comments received in response to the notice proposing to require marking of audio cassette shells, Customs has determined to withdraw the proposal.

EFFECTIVE DATE: April 24, 1984.

FOR FURTHER INFORMATION CONTACT: Harold I. Loring, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

SUPPLEMENTARY INFORMATION:

Background

Section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), provides that unless expressly excepted, every imported article of foreign origin (or its container) shall be legibly and conspicuously marked to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), sets forth the regulations implementing the country of origin marking requirements and the exceptions of 19 U.S.C. 1304(a).

Section 134.35, Customs Regulations (19 CFR 134.35), provides that an article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision in the case of *United States v. Gibson-Thomsen Co., Inc.*, 27

CCPA 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of 19 U.S.C. 1304(a), and the article shall be excepted from marking.

The "ultimate purchaser" is generally the last person in the United States who receives the article in the form in which it was imported. Under section 134.1(d) (1), Customs Regulations (19 CFR 134.1(d) (1)), if an imported article will be used in manufacture, the manufacturer may be the "ultimate purchaser" if he subjects the article to a process which results in its substantial transformation, even though the process may not result in a new or different article.

By a decision dated June 14, 1978 (MAR-2-05-R:E:R 709123 JB), Customs ruled that audio cassette shells were not required to be individually marked with the country of origin because the addition of the magnetic tape constituted a substantial transformation within the principle of the decision in *United States v. Gibson-Thomsen Co., Inc., supra,* and under section 134.35, Customs Regulations.

On November 16, 1982, a notice was published in the Federal Register (47 FR 51586), advising the public that based upon a petition submitted on behalf of several domestic manufacturers of audio cassette shells, Customs was reviewing its position of excepting imported shells from the marking requirements. The notice invited the public to submit comments regarding the proposed change.

Analysis of Comments

Customs received 24 comments in response to our notice, 5 supporting a change of position and 19 in opposition. Of those comments received in support of the change, 4 were from Congressional sources on behalf of constituent domestic manufacturers of audio cassette shells. The fifth comment was submitted directly by a consortium of such manufacturers. The arguments submitted in favor of the proposal include that marking the shells will better inform consumers as to the origin of cassettes and that the domestic tape-loading process is an insignificant portion of the entire process and does not substantially transform the foreign shells to products of the United States.

We are of the opinion that marking a cassette shell as a foreign product might well lead to considerable consumer confusion. The single most important element for the consumer in a finished audio cassette is the magnetic tape itself, not the standardized cassette shell. Consumers of cassettes might well be misled by a foreign origin marking on the cassette and come to the understandable

conclusion that the critical tape element is a product of that foreign country.

In *United States* v. *Gibson-Thomsen Co., Inc., supra,* the court held that a manufacturer or processor in the United States who converts or combines (substantially transforms) an imported article into a new article having a new name, character and use will be considered the "ultimate purchaser" of the imported article which thereby is excepted from marking under 19 U.S.C. 1304(a). In *Grafton Spools, Ltd.* v. *United States,* 45 Cust. Ct. 16, C.D. 2190 (1960), the court held that empty ribbon spools for business machines were excepted from marking because the spools were substantially transformed, *i.e.,* lost their identity as separate articles of commerce, when wrapped with inked ribbons by a process requiring technical skill and competence. Ribbon manufacturers which imported the empty spools were held to be ultimate purchasers who resold to business machine manufacturers a new and different article of commerce. As the *Grafton* court stated: "What the ribbon manufacturers sell are ribbons. True, the ribbon is wound on a spool. But it is the ribbon, so wound, and not the spool as such, which the business machine manufacturers buy from the ribbon manufacturers."

In this instance, the empty cassette shells and magnetic tape are likewise physically integrated into a new and unified whole, a tape cassette, which is sold to consumers who cannot use one part of the whole without the other. Either the empty cassette shell or the tape alone cannot serve the ordinary consumer's purpose. As such, the combined tape cassette appears to pass the substantial transformation test applied by the court in *Midwood Industries, Inc.* v. *United States,* 64 Cust. Ct. 499, C.D. 4026 (1970), which distinguished between producer's goods and consumers' goods.

However, the decision in *Uniroyal, Inc.* v. *United States,* 542 F. Supp. 1026 (C.I.T. 1982), requires us to compare more closely the cost and complexity of processing performed domestically versus processing performed abroad. If the domestic processing is minor, then physical integration alone may not satisfy the substantial transformation test. It has been shown that the foreign cassette manufacturing operation is more costly than the domestic tape-loading operation (which also requires technical equipment and skilled operation). Such cost comparisons exclude the American tape-manufacturing process as irrelevant from a legal standpoint. These cost comparisons are misleading, however, in the present case where the ordinary consumer is more interested in the tape than in the cassette shell which is merely a "housing" for the tape. Although the cost of tape-loading is small compared to the cost of shell manufacture, the tape-loading is a key operation that adds an essential part which changes the very nature of the imported article. Such processing is not minor. Furthermore, when the cost of the tape-loading is added to the cost of the domestically-added tape, the total is almost one-half the entire cost of the completed tape

cassette. Customs is of the opinion that the cost of domestic processing, in view of the nature of such processing, is sufficient to satisfy the *Uniroyal* test. Unlike the *Uniroyal* case, in which the imported uppers were the essence of the shoe (that element in which the consumer was most interested) we belive the essence of the tape cassette is the magnetic tape which is added in the United States.

ACTION

WITHDRAWAL OF PROPOSAL

In view of the foregoing, Customs has determined that the proposed change should not be adopted. Accordingly, the notice published in the Federal Register on November 16, 1982 (47 FR 51586), proposing to require imported audio cassette shells to be individually marked with their country of origin, is withdrawn.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved April 6, 1984.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 24, 1984 (49 FR 17518)]

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 84-39)

718 FIFTH AVENUE CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-11-01664

Before RESTANI, *Judge.*

[Defendant's motion to dismiss granted.] (Dated April 13, 1984)

Rode & Qualey (Patrick D. Gill, Esq.) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, and *Michael P. Maxwell, Esqs.*, for defendant.

Opinion and Order

RESTANI, *Judge:* This case is before the court on defendant's motion to dismiss plaintiff's claim for want of subject matter jurisdiction.

In this action plaintiff seeks drawback of duties assessed on a ruby. Plaintiff imported the ruby on May 11, 1982, and entered it under a duty free classification as American goods returned. Plaintiff then exported the ruby on June 2, 1982. The Customs Service, however, rejected the initial entry on June 9, 1982 and determined that the ruby was dutiable at a rate of 9.9% ad valorem. On March 25, 1983, the Customs Service liquidated the entry and assessed $227,947.50 in increased duty.[1]

On July 22, 1982, after exporting the ruby, and after learning of the Customs Service's determination that the ruby was dutiable, plaintiff filed a drawback entry seeking remission of 99% of the import duties. Plaintiff's drawback claim was based on its contention that the ruby was entitled to same condition drawback pursuant to 19 U.S.C. § 1313(j) (1982). On May 20, 1983, the Customs Service denied the drawback claim. Plaintiff did not protest the denial of this drawback claim.

On September 17, 1982, plaintiff requested a ruling as to whether it would be entitled to drawback of the duty on the ruby under a variety of circumstances. In the part of its request relevant to this action, plaintiff asked the Customs Service to determine if plaintiff would be entitled to drawback if it re-imported the ruby then re-exported the ruby within three years of the original importation.

The Customs Service ruled that a drawback entry could not be perfected on a second exportation of an article. The Customs Service asserted that same condition drawback could only apply when the initial exportation following the importation perfected the drawback claim.

The Customs Service issued its ruling on February 25, 1983. Plaintiff filed suit on November 22, 1983 seeking a declaratory judgment that the Customs Service's ruling was erroneous.

This court has jurisdiction to issue declaratory judgments pursuant to 28 U.S.C. § 1581(h) (1982).[2] The issue before the court is

---

[1] The Customs Service's assessment was based on the fact that the ruby was reimported along with a gold ring that had been fashioned as a mounting for the ruby. The Customs Service determined that the ruby and its mounting should be considered as an entirety for classification purposes and that the entirety was dutiable at a rate of 9.9% ad valorem. Plaintiff has challenged this determination in a separate action. Court No. 84-2-00255.

[2] 28 U.S.C. § 1581(h) reads in relevant part:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury * * * relating to * * * drawbacks * * *, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

whether plaintiff has satisfied the jurisdictional requirements for an action under § 1581(h).

When jurisdiction is challenged, plaintiff has the burden of demonstrating that jurisdiction exists. *United States* v. *Biehl & Co.*, 3 CIT 158, 539 F.Supp. 1218 (1982). The Court of Appeals for the Federal Circuit has defined the requirements for invoking this court's declaratory judgment jurisdiction,

> (1) Judicial review must be sought prior to importation of goods;
> (2) Review must be sought of a ruling, a refusal to issue a ruling, or a refusal to change such ruling;
> (3) The ruling must relate to certain subject matter; and
> (4) Irreparable harm must be shown unless judicial review is obtained prior to importation.[3]

American Air Parcel Forwarding Co. v. *United States*, 718 F.2d 1546, 1551–1552 (Fed. Cir. 1983).

In this case, it is undisputed that plaintiff satisfies the first three requirements. Plaintiff is seeking judicial review prior to importing the ruby for purposes of the drawback claim. Plaintiff seeks review of a ruling governing the specific import transaction contemplated by plaintiff. *See Pagoda Trading Co.* v. *United States*, 6 CIT —, Slip Op. 83–131 (December 15, 1983). And the ruling at issue relates to a drawback claim. Drawback rulings are expressly within the scope of §1581(h).

The central issue here is whether plaintiff has demonstrated that it will be irreparably harmed if denied judicial review prior to importing the ruby.[4] Plaintiff asserts three grounds in support of its claim of irreparable harm.

Plaintiff principally contends that without judicial review prior to importation it will not obtain adequate administrative and judicial review of its drawback claim, and this would irreparably harm it. Plaintiff asserts that, because of the adverse ruling it has received from the Customs Service, the Customs Service will not permit plaintiff to demonstrate its entitlement to its drawback claim. Plaintiff asserts that the Customs Service will not inspect the ruby and allow plaintiff to prove that it qualifies for the same condition drawback, since the Customs Service will be bound by its ruling foreclosing drawback under these circumstances. Because it will not receive adequate administrative review, plaintiff contends that it would be prejudiced in seeking judicial review of the denial of drawback.

---

[3] The standard for proving irreparable harm here is essentially identical to that used to determine irreparable injury in cases where injunctive relief is sought. *See Manufacture de Machines du Haut-Rhin* v. *Von Raab*, 6 CIT—, 569 F.Supp. 877 (1983).

[4] Plaintiff contends that defendant's motion is more properly a motion to dismiss for failure to state a claim upon which relief can be granted, and as such all of plaintiff's allegations should be treated as true. This contention is meritless. Plaintiff admits that irreparable harm is a statutory prerequisite to §1581(h) jurisdiction. §1581(h) expressly places the burden on plaintiff to demonstrate that it would be irreparably harmed if denied judicial review. Defendant's motion puts at issue whether plaintiff has met this burden, not whether plaintiff has adequately alleged irreparable harm.

This argument is not persuasive. At the outset, plaintiff's contention that the Customs Service will not give adequate administrative review to the drawback claim is highly speculative. And even if Customs does deny drawback without inspecting the ruby and permitting plaintiff to develop an administrative record to support its claim, plaintiff will not be denied appropriate review. Plaintiff will be able to challenge any denial of its drawback claim through filing a protest and seeking judicial review if the protest is denied. 19 U.S.C. §§1514, 1515; 28 U.S.C. §1581(a). If this court determines that the Customs Service has not developed an adequate administrative record, either this court will make the necessary finding of facts, or it will remand the case to the Customs Service for further proceedings. *House of Adler, Inc.* v. *United States,* 2 CIT 274 (1981).

Moreover, accepting this contention would effectively eliminate the requirement of irreparable harm. If the adverse effect of receiving an unfavorable ruling was sufficient alone to establish irreparable harm, then any importer aggrieved by a ruling could invoke this court's declaratory judgment jurisdiction. The importer would only have to allege that the Customs Service had ruled against it and the unfavorable ruling would make it unlikely that the importer could obtain the desired result when the import transaction was attempted. Thus, in similar circumstances, the Court of Customs and Patent Appeals recognized that a importer is not irreparably harmed by a binding agency ruling contrary to the importer's position. *United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 687 F.2d 467 (1982).

Plaintiff also contends that it will be irreparably harmed if denied preimportation review because the three year time limit for perfecting its drawback claim may expire. This contention is meritless. To perfect its drawback claim, plaintiff need only file its drawback entry and re-export the ruby within the three year period. 19 U.S.C. § 1313(j)(1)(A)(i); 19 C.F.R. § 191.8 (1983). At that point the statutory time limit will be satisfied. Any delays in the administrative or judicial review of the merits of the drawback claim would be irrelevant once the ruby is re-exported. Plaintiff's contention that it will be much more difficult to prove that it is entitled to same condition drawback after exportation is unpersuasive. The ruby will still be in plaintiff's possession. Exportation will not make it any less accessible.

Finally, plaintiff contents that the delay resulting from denying preimportation review irreparably harms its business operation since it allegedly cannot sell the ruby and is faced with mounting inventory costs. Business disruption resulting from administrative delay could be sufficient to demonstrate irreparable harm. *See American Air Parcel Forwarding Co.* v. *United States,* 1 CIT 293, 515 F.Supp. 47 (1981). However, the court is not persuaded that plaintiff has adequately demonstrated irreparable harm here.

Plaintiff has not documented any of its allegations of business disruption. Plaintiff alleges that it cannot sell the ruby until the drawback claim is settled. But plaintiff has not demonstrated that it has any intention to sell the ruby or that any particular sale has been lost. Plaintiff also has not documented the inventory costs of retaining the ruby. Such documentation is essential to establishing irreparable harm. *Di Jub Leasing Corp.* v. *United States,* 1 CIT 42, 52–53, 505 F. Supp. 1113 (1980).

Moreover, plaintiff's delay in bringing this action is evidence that would not be irreparably harmed if it is denied preimportation review. The ruling plaintiff challenges was issued February 25, 1983. Plaintiff did not file suit until November 22, 1983. If plaintiff is seriously concerned about lost sales or inventory costs, it did not demonstrate that concern during that period. Admittedly, circumstances could have changed and plaintiff could now be facing irreparable harm. But plaintiff has provided no serious evidence of the harm it faces.

Therefore, the court finds that plaintiff has failed to demonstrate that it would be irreparably harmed if denied review of the contested Customs Service ruling prior to importation of the ruby.

It is ORDERED:

That plaintiff's cause of action is dismissed.

(Slip Op. 84–40)

BEKER INDUSTRIES CORP., PLAINTIFF, *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 83–12–01818

Before RESTANI, *Judge.*

[Plaintiff's motion to strike denied.]

Dated April 13, 1984

Skadden, Arps, Slate, Meagher & Flom (Rodney O. Thorson, Esq.) for the plaintiff. *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, and *Velta A. Melnbrencis, Esqs.,* for defendants.

Opinion

RESTANI, *Judge:* This motion to strike certain portions of the defendants' answer arises out of litigation in which plaintiff, a United States company engaged in the importation of elemental sulphur from Canada, challenges the final results of administrative review of an antidumping finding on elemental sulphur from Canada.[1] Plaintiff seeks an order striking certain paragraphs of de-

[1] The "Final Results of Administrative Review and of Antidumping Findings" with regard to elemental sulphur from Canada which plaintiff challenges were published on November 28, 1983 at 48 Fed. Reg. 53592 (1983). The actual determination challenged in this action was made by the Department of Commerce's International Trade Administration ("ITA") *See* 19 U.S.C. § 1675(a) (1982).

fendants' answer and declaring that the corresponding allegations set forth in the complaint are admitted on the grounds that the answers are inadequate and uninformative, are not made in good faith and are not in accordance with Rules 8(c) and 11 of the rules of this court.[2]

The answers challenged relate to paragraphs 10 through 15 and 18 through 26 of the Complaint. The allegations in paragraphs 10 through 15 pertain generally to the nature of plaintiff's relationship to Canamex Commodity Corporation ("Canamex"), a Canadian company which purchases elemental sulphur from Canadian producers and sells it to plaintiff; the relationship between Canamex and its suppliers and plaintiff's knowledge thereof; plaintiff's knowledge of the suppliers' identities; the suppliers' knowledge as to any contractual terms or prices which Canamex charges plaintiff; various functions which Canamex performs in connection with its sulphur trading; and selling restrictions or obligations of Canamex relating to sales inside and outside of Canada. The allegations in paragraphs 18 through 26 pertain generally to preliminary and final determinations made by the ITA with regard to elemental sulphur from Canada, and in particular, the methods by which dumping margins were arrived at; various events relating to these decisions; and various claims relating to the results reached and the knowledge and information which Commerce possessed.

Defendants set forth their answers to each of these allegations, with minor variation, as follows:

> Deny the allegations of paragraph [ ] except to the extent established by the administrative record in this action, which record is the best evidence of its contents.

Plaintiff essentially alleges that the challenged portions of defendants' answer do not constitute proper denials under Rule 8(c); that the good faith requirement of Rule 11 has not been satisfied; and that the denials should be stricken.[3] Therefore, plaintiff argues, the allegations of the complaint relating to the improper denials should be deemed admitted under Rule 8(e).[4] Plaintiff argues that the denials should be stricken and that the good faith requirement of Rule 11 has not been satisfied.

Defendants respond that it is plaintiff's initial burden to identify by specific page references to the administrative record the legal questions and factual issues involved; that plaintiff's allegations were general and did not specifically refer to the administrative

---

[2] Unless otherwise noted, all rules referred to herein are Rules of the Court of International Trade.

[3] Plaintiff also attacks the government's use of the phrase "which [administrative] record is the best evidence of its contents." The court is unpersuaded that the government intended to invoke Fed. R. Evid. 1001–1004 by its choice of phraseology as plaintiff alleges. If the government did intend to invoke Fed. R. Evid. 1001–1004, it is irrelevant at this point and also harmless. The importance and relevance of the administrative record will be discussed, *infra*.

[4] Rule 8(e) provides:

(e) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

record; and additionally, that many of plaintiff's allegations include legal characterizations of the alleged facts.

After a close reading of both the complaint and answer, the court concludes that the portions of defendants' answer under attack sufficiently comply with the spirit of the pleading rules, especially in light of the nature of the relevant statute and Rule 56.1 review, as well as the form of plaintiff's corresponding allegations.

Motions to strike under Rule 12(f) of this court's rules,[5] which is identical to Rule 12(f) of the Federal Rules of Civil Procedure, are not favored by the courts. *Lunsford* v. *United States,* 570 F. 2d 221 (8th Cir. 1977); *United States* v. *416.81 Acres of Land,* 514 F. 2d 627 (7th Cir. 1975). The motion is recognized to be a drastic remedy. *Augustus* v. *Board of Public Instruction,* 306 F. 2d 862 (5th Cir. 1962); *Brown & Williamson Tobacco Corp.* v. *United States,* 201 F. 2d 819 (6th Cir. 1953). District courts and similarly, this court, have broad discretion in disposing of motions to strike. *See Anchor Hocking Corp.* v. *United States,* 419 F. Supp. 992 (M.D. Fla. 1976); *Smith, Kline & French Laboratories* v. *A. H. Robbins Co.,* 61 F.R.D. 24 (E.D. Pa. 1973); *Moore* v. *Prudential Ins. Co.,* 166 F.Supp. 215 (M.D.N.C. 1958).

The basic thrust of plaintiff's motion is that the answer violates Rule 8(c) which provides in pertinent part:

> A party shall * * * admit or deny the averments upon which the adverse party relies * * *. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he except such designated averments or paragraphs as he expressly admits; but when he does so intend to controvert all its averments * * * he may do so by general denial subject to the obligations set forth in Rule 11.

"It is well to remember that procedure 'exists only for the sake of "substantive" law.'" *Berkey Technical Corp.* v. *United States,* 71 Cust. Ct. 275, 276, C.R.D. 73-27, 380 F.Supp. 786 (1973) *citing* Holland, *Jurisprudence* 355 (12th ed. 1917). The "substantive" law involved in this case is the antidumping law, or stated with more specificity, judicial review under 19 U.S.C. §§1516a(2)(B)(iii) and (b)(1)(B) (1982) of the results of periodic administrative review of

[5] Rule 12(f) provides:
Motion To Strike. Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

antidumping determinations made pursuant to 19 U.S.C. §1675.[6] Inseparable from the substantive law involved here is the procedural law which governs review by this court. When a determination by the administering authority under 19 U.S.C. §1675 is contested, as here, the court's review is narrow. It is limited to a review of the administrative record for the purpose of determining whether the challenged determination or any underlying finding or conclusion is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B). *See Kyowa Gas Chemical Industry Co.* v. *United States,* 7 CIT —, Slip Op. 84-30 at 5-6 (March 30, 1984).

Rule 56.1, "Motion for Review of Administrative Determinations Upon an Agency Record," which will govern consideration of this matter, accentuates the unique nature of the particular review action relating to the pleadings challenged. Full import must be given to the provisions of Rule 56.1. *See Roquette Freres and Roquette Corp.* v. *United States,* 7 CIT —, Slip Op. 84-11 at 4 (February 17, 1984). In accordance with section 1516, Rule 56.1(a) makes clear that 'the determination of the court is to be made solely upon the basis of the record made before an agency." *See also Roquette Freres and Roquette Corp.* v. *United States, supra* (the Rule 56.1 proceeding is "exclusively a review on the administrative record"). As such, the administrative record plays an extremely important, "evidentiary" sort of role in this type of administrative proceeding. As defendants point out, there are no new factual issues to be tried because there is no right of trial *de novo.* Thus, it is permissible for defendants to make reference to the record in denials corresponding to allegations in the complaint which are unclear, ambiguous, suggestive of extraneous or immaterial points, or appear to exceed the bounds of inquiry.

Furthermore, "[s]ubsection (c) of Rule 56.1 specifically prescribes the contents of motion papers and accompanying briefs submitted to this Court either contesting or supporting the agency determination." *Roquette Freres and Roquettte Corp.* v. *United States, supra.*[7]

---

[6] Section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. §1675(a) requires that the ITA conduct at least one review annually in which it determines the amount of any antidumping duty, the results of which must be published in the Federal Register. *See Kyowa Gas Chemical Industry Co., Ltd.* v. *United States, supra,* at 2, n. 1; *see also Smith Corona Group, Consumer Products Division* v. *United States,* 1 CIT 89, 507 F.Supp. 1015 (1980).

[7] Rule 56.1(c) states:

> In addition to the other requirements prescribed by these rules, the motion papers and briefs submitted on the motion, either contesting or supporting the agency determination, shall include a statement setting forth in separate numbered paragraphs:
>
> (1) The administrative determination sought to be reviewed with appropriate reference to the Federal Register.
>
> (2) The issues of law presented together with the reasons for contesting or supporting the administrative determination, specifying how the determination may be arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, unsupported by substantial evidence or how the determination may have failed to consider facts which, as a matter of law, should have properly been considered. The party should include the authorities relied upon and the conclusions of law deemed warranted by the authorities.
>
> (3) The issues of fact being raised together with a specification of how one of the standards of administrative action mentioned above has been or has not been violated.
>
> (4) All references to the administrative record shall be made by citing the portions of the record to the factual or legal issues raised. Citations shall be by page number of the transcript, if any, and by specific identification of exhibits together with the relevant page number.

To require initial pleading to thoroughly cover the matters required under Rule 56.1(c) would make superfluous most post-pleading filings. The court has decided through its rule making that details are best covered through briefing under Rule 56.1. Consequently, pleading procedure is, at least in this case, altered by the substantive law and related procedures involved here.[8] The court is particularly reluctant to expect more thorough responses on defendants' part where plaintiff itself has not cited to the administrative record. In light of the burdens imposed by Rule 56.1 defendants' denials appear to "fairly meet the substance of the averments denied," *see* Rule 8(c). This reading of the pleadings does substantial justice. *See* Rule 8(g).[9]

Moreover, "pleadings have served their functions once they have framed the issue." *Berkey Technical Corp.* v. *United States, supra* 71 Cust. Ct. at 278. We believe that defendants' denials do just that: we are apprised of the issues in dispute. Once the issues have been framed, it is then time for the precise presentation of reasons for contest or support of the agency determination in accordance with Rule 56.1(c). After all, the pleading rules were designed to avoid and reduce long and technical allegations. *See Wally* v. *Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973). With the exception of fraud and mistake,[10] there is no requirement in the rules that pleading be particular.

Although a case involving classification issues, we find *R. J. Saunders & Co.* v. *United States*, 66 Cust. Ct. 271, C.D. 4203 (1971) to be instructive. In *R. J. Saunders*, before the court was the plaintiff's motion for a more definite statement with respect to the defendant's answer. The answer denied allegations of the complaint and stated in a separate paragraph its contention that the decision of the Regional Commissioner was correct. The court denied this motion, finding that such detail was not required by the rules. *See id.* at 272. The inclusion by plaintiff in the complaint of detailed evidentiary matter did not require the answer to state defendant's contentions regarding law and fact as to each denial of those evidentiary facts. Similarly, to the extent that plaintiff in this case has included detailed evidentiary matter, or legal conclusions, defendants are not required to respond in like manner.[11]

---

[8] It is indeed important that the court heed the warning

> * * * that in § 1516a review proceedings the intention and, indeed, the mandate of Congress for an expeditious judicial determination on the administrative record [may become] subverted by reason of the questionable use of the rules of pleading and practice and motions relating thereto designed primarily for the *trial* of actions in this court.

Roquette Freres and Roquette Corp. v. *United States, supra* at 4.

[9] Rule 8(g) provides:

> *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

[10] Rule 9(b) provides in part, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See generally United States* v. *F.A.G. Bearings Corp.*, 7 CIT —, Slip Op. 84–4 (January 1, 1948). But even Rule 9(b) "does not require nor make legitimate the pleading of detailed evidentiary matter." *Wally* v. *Beverly Enterprises, supra* at 397.

[11] Plaintiff's argument that "* * * if there is evidentiary matter in the record from which inferences can be drawn, some favoring and some adverse to the plaintiff, there is no way in which that can be discerned from the proffered pleading" is thus inappropriate.

Although some of defendants' answers could have been more accurate,[12] this has caused plaintiff no prejudice. We also find that plaintiff has not sufficiently demonstrated a lack of good faith. *See* Rule 11. If the less drastic remedy of requiring amended pleadings would result in clarification of benefit to all parties and the court, the court would consider this remedy, but in this case this would not benefit anyone, including plaintiff; it would merely delay the case. For the above reasons and because this Court is hesitant to grant the extraordinary relief requested in these circumstances, plaintiff's motion to strike is denied.

(Slip Op. 84-41)

HIDE-AWAY CREATIONS, LTD., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 83-5-00644

Before BERNARD NEWMAN, *Senior Judge.*

CONFECCIONES GENERALES, S.A., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 83-5-00645

Leather Wearing Apparel From Mexico—Supplemental Final Results of Administrative Review of Countervailing Duty Order

[Plaintiffs' motion for approval of supplemental final results granted; plaintiffs' request for interest on deposits denied.]

(Dated April 13, 1984)

Kemp, Smith, Ducan & Hammond, Esqs. (Luis Chavez and *John J. Scanlon, Jr., Esqs.*, of counsel) for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch and *Sheila N. Ziff, Esq.*, for defendants.

BERNARD NEWMAN, *Senior Judge:* Although the present matter appeared to the Court at first blush to warrant but a very brief memorandum to accompany a somewhat routine order disposing of these cases, a further careful analysis of a complex facet of our international trade law has thwarted the anticipated summary disposition.

1.

In these companion actions, plaintiffs contest the final results of an administrative review of a countervailing duty determination and order of the United States Department of Commerce, Interna-

[12] For example, defendants' responses could have noted that some of plaintiff's allegations were legal conclusions to which no response was required. It may also be that very limited review of the record would have been necessary in order for defendant to more specifically answer some parts of the complaint.

tional Trade Administration (ITA) conducted pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675, covering imports of leather wearing apparel from Mexico (48 Fed. Reg. 13474 (March 31, 1983)).

Plaintiffs seeks to restrain the assessment of countervailing duties and the collection of a cash deposit of estimated countervailing duties of $169,216.18 on their imported merchandise on the ground that the exporter, Confecciones Generales, S.A., received no bounty or grant from the Mexican Government within the meaning of section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303.

The background of this action is set forth in *Hide-Away Creations, Ltd.* v. *United States; Confecciones Generales, S.A.* v. *United States,* 6 CIT—, Slip Op. 83-135 (December 21, 1983) and need not be fully repeated here. Briefly, this Court held that ITA failed to comply with the statutory requirement for publication of notice in the Federal Register concerning the initiation of a section 751 review. Further, this Court concluded that the lack of proper notice prior to the initiation of the first annual review under section 751 prejudiced plaintiffs by ITA's exclusion from consideration of zero rate certifications pertaining to Confecciones Generales, S.A. regarded by ITA as untimely and by ITA's subsequent denial of a zero rate to Confecciones. Consequently, in its order of December 21, 1983, the Court remanded these cases to ITA with instructions that within 30 days the agency "review as part of the administrative record in these matters the zero deposit rate certifications pertaining to Confecciones received by ITA on April 21, 1983 and any matters pertinent thereto", and publish in the Federal Register supplemental final results of its administrative review. Temporary injunctions restraining defendants from liquidating any of the entries covered by the final results and from enforcing or implementing the final results were extended to 20 days after the final disposition by the Court following remand. Finally, the order of December 21, 1983 required that certified copies of the supplemental results be transmitted by Commerce to the Clerk of this Court and also served upon plaintiffs.

On January 20, 1984 the Court received from Commerce a certified copy of its "Notice of Supplemental Final Results of Administrative Review of Countervailing Duty Order", dated January 13, 1984, regarding leather wearing apparel from Mexico.

According to ITA's notice, on remand Commerce reviewed the certifications previously submitted by Confecciones and determined that "the total bounty or grant for the period was zero for the firm of Confecciones". ITA's notice further indicates that in accordance with the supplemental final results, Commerce will instruct the Customs Service to assess no countervailing duties on shipments of the subject merchandise that were entered, or withdrawn from warehouse, for consumption on or after January 14, 1981 and exported on or before December 31, 1981.

The Court has received a letter dated January 27, 1984 from plaintiffs' counsel advising that plaintiffs have approved the supplemental final results. Thereupon and by letter dated February 1, 1984, this Court requested plaintiffs' counsel to submit an appropriate motion and order disposing of these cases. Presently before the Court is plaintiffs' motion for judgment: approving the supplemental final results; directing the Customs Service to refund all cash deposits of estimated countervailing duties tendered to it for the entry of Mexico leather wearing apparel during the period January 14, 1981 through December 31, 1981; releasing plaintiffs and their surety from their bond; and allowing interest "as provided by 19 U.S.C. § 1677g".

In a reply letter by defendants' attorney to plaintiffs' counsel, dated March 6, 1984, the Government concedes its statutory obligation to refund the cash deposits of estimated countervailing duties and to release plaintiffs from their bond. Defendants, however, have taken no position respecting plaintiffs' request for the payment of interest which, due to the amount of the deposits, passage of time, and the recent high interest rates, would amount to a substantial figure.

2

Significantly, the question of the Government's obligation to pay interest under the circumstances presented herein is a matter of first impression and great importance in the administration of our countervailing duty law.

Respecting the payment of interest on amounts deposited as estimated countervailing duties, the Court notes that under 19 U.S.C. § 1677g interest is payable on overpayments of amounts deposited "on merchandise entered, or withdrawn from warehouse, for consumption on and after the date on which *notice of an affirmative [injury] determination by the [International Trade] Commission under section 705(b) or 735(b) [19 U.S.C. § 1671d(b) or 1673d(b)] with respect to such merchandise is published"* (Emphasis added). But as mentioned *supra,* plaintiffs have requested payment of interest on deposits of estimated countervailing duties for entries of Mexican leather wearing apparel during the period January 14, 1981 (date liquidation was suspended in the preliminary affirmative determination) through December 31, 1981 (end of the review period). Inasmuch as Mexico is not a "country under the Agreement" within the meaning of section 701(b) of the Act (19 U.S.C. § 1671(b)), no determination of injury under section 705(b) was required in the countervailing duty investigation. Hence, unfortunately for plaintiffs, an operative circumstance or condition required by 19 U.S.C. § 1677g (*viz.* notice of an affirmative injury determination under section 1671d(b)) did not, and could not, occur in the present case where the imported merchandise is from a nonsignatory country. *Cf. Ambassador Div. of the Florsheim Shoe Co.* v. *United States, et*

al., 6 CIT —, Slip Op. 83-125, 577 F. Supp. 1016 (December 1, 1983), *appeal pending*, CAFC No. 84-814.[1] Therefore, in the case of a nonsignatory country—as Mexico—the law existing prior to the Trade Agreements Act of 1979, when no interest could be paid by the Government with respect to overpayments of amounts to secure a liability for countervailing duties,[2] is still in effect.

As described, *supra*, plaintiffs have requested that interest be paid on their estimated countervailing duty deposits in connection with entries on and after January 14, 1981, the date of ITA's preliminary affirmative determination. In essence, then, plaintiffs are seeking an award of interest on overpayments more favorable than could be allowed under section 1677g in a case where merchandise is imported from a country under the agreement, for which an injury determination is *required*. As emphasized above, under section 1677g interest on overpayments may be paid only in connection with entries on and after the date of publication of the Commission's final injury determination.

The short of the matter is: since Mexico is not a "country under the Agreement", and thus no determination of injury is required, there simply cannot be any "overpayments * * * of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after the date on which notice of an affirmative determination by the Commission under section 705b * * * with respect to such merchandise is published". 19 U.S.C. § 1677g.[3] Hence, the Court is constrained to conclude that section 1677g does not apply in this case—and therefore plaintiffs are not entitled to the interest they seek.

In view of the foregoing, plaintiffs' motion for judgment: approving the supplemental final results; directing the Customs Service to refund all cash deposits of estimated countervailing duties tendered to it for the entry of Mexican leather wearing apparel during the period January 14, 1981 through December 31, 1981; and releasing plaintiffs and their surety from their bond is granted. Plaintiffs' request for interest under § 1677g is denied.

Judgment will be entered accordingly.

---

[1] In *Florsheim*, the Court explained the lack of an injury test respecting a country not under the agreement (577 F. Supp. at 1018-19):

> The Trade Agreements Act of 1979, effective January 1, 1980, enacted a new countervailing duty law, Title VII of the Tariff Act of 1930, as amended, which was subsequently reported as Subtitle IV, Chapter 4, title 19, United States Code. One of the major purposes of the Act was to approve the multilateral trade agreements concluded in 1979 and to implement substantive provisions of United States law. Among the agreements reached during the multilateral trade negotiations was the agreement on Interpretation and Application of Articles VI, XVI, XXII of the General Agreement on Tariffs and Trade ("Subsidies code"). Signatories to the Subsidies Code agreed to impose countervailing duties on all subsidized merchandise after a determination that said merchandise had caused or threatened to cause material injury to a domestic industry. *See* S. Rep No. 249, 37-38. The United States accepted the Subsidies Code with the qualification that the "injury test" would be applicable only to those countries who were signatories to the code. *See* S. Rep. No. 249, 13. Accordingly, the injury test was applied only to new investigations when the merchandise was imported from a country under the agreement. For countries not under the agreement the law would continue to authorize the imposition of countervailing duties without an injury test. *Id.* 43-44.

[2] S. Rep. No. 249, 96th Cong., 1st Sess. 101 (1979).

[3] Interestingly, although not at issue in this case, we note that section 1677g similarly provides for payment of interest on *underpayments*.

(Slip Op. 84-42)

HECTOR RIVERA SIACA, D.B.A. GUAYABERAS DON HECTOR, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-10-01414

Before RESTANI, *Judge.*

[Plaintiff's motion for rehearing denied]

(Dated April 17, 1984)

John M. Garcia, Esq., for plaintiff.
Richard K. Willard, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office and *Michael P. Maxwell, Esqs.*, for defendant.

Opinion on Motion for Rehearing

RESTANI, *Judge:* On January 26, 1984, this court dismissed this action for want of subject matter jurisdiction. *Hector Rivera Siaca, d/b/a Guayaberas Don Hector* v. *United States*, 7 CIT —, Slip Op. 84-5 (January 26, 1984). Plaintiff seeks rehearing and reconsideration of the court's decision on the ground that the court misconstrued the nature of plaintiff's complaint.

The relevant facts are as follows. On October 5, 1979, Customs Service agents seized certain shirts belonging to plaintiff. The shirts were sold at auction and the proceeds applied towards the United States' claims against plaintiff under the customs laws. Plaintiff did not protest the subsequent reassessment of duties on account of alleged fraud pursuant to the statutory protest mechanism available. Instead, plaintiff filed a tort action relating to the seizure of the shirts. The tort action against the United States was dismissed for lack of jurisdiction by the United States District Court for the District of Puerto Rico. On May 24, 1982, plaintiff filed this action in the district court, but the action was transferred to the United States Court of International Trade on the basis that the action was a collateral attack on the assessment of duties.[1] In this action plaintiff asserts that the shirts were illegally seized, and he seeks their return or equivalent value. The Government contends the shirts were voluntarily turned over to it.

The one theory of recovery discussed in the motion for rehearing, a theory which plaintiff previously raised here and in the district court, is that which is well-explained in *Hunsucker* v. *Phinney*, 497 F.2d 29 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). In that case plaintiff sued to recover documentary evidence which he alleged was illegally seized by government agents. The court explained that jurisdiction was not based on 28 U.S.C. § 1331 because a feder-

[1] The parties are in agreement that the only matter which was transferred to this court is a suit against the United States. The original action included a claim against a Customs Service employee. Plaintiff appears to have abandoned in this suit any claim which still exists as to the Customs Service employee since plaintiff avers that he seeks recovery of his property, and not damages.

al question was not involved, and the requisite jurisdictional amount for § 1332 jurisdiction was lacking. Rather, jurisdiction was based on the inherent power of the court to control its officers. The court stated that exercise of this "anomalous" jurisdiction was governed by equitable principles. Without deciding whether such jurisdiction exists in a case where only civil, rather than criminal, proceedings are threatened, the court dismissed the case because, *inter alia*, there was no showing of irreparable injury to plaintiff nor was there a showing of callous disregard for constitutional rights. The *Hunsucker* line of reasoning was followed in *Richey* v. *Smith*, 515 F.2d 1239 (5th Cir. 1975), and in *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F.2d 15 (7th Cir. 1978).[2]

Even under the theory espoused by plaintiff, plaintiff must establish a lawful right to the property sought before return of the property will be ordered. *Shea* v. *Gabriel* 520 F.2d 879, 882 (1st Cir. 1975) and *United States* v. *Premises Known as 608 Taylor Ave.*, 584 F.2d 1297 (3rd Cir. 1978). Plaintiff has failed to establish this right.

The record in this case and in *American Motorists Insurance Co.* v. *United States*, 5 CIT —, Court No. 82-1-00053, Slip Op. 83-8 (1983) establishes that the proceeds from the auctioned goods were actually applied to duties owed by the plaintiff. In *American Motorists*, a related 28 U.S.C. § 1581(a) suit brought by plaintiff's surety, thirty-seven of plaintiff's entries of shirts were found to have been properly reliquidated under 19 U.S.C. § 1521 (1982). It was established that plaintiff owed well over $100,000 in duties. This is more than three times the auction proceeds.

Although defendant claims the shirts were turned over to it voluntarily, if the shirts were involuntarily seized, it was a seizure relating to 19 U.S.C. § 1592, the statute governing penalties. Under 19 C.F.R. § 162.52 (1983) the proceeds of such seizures are applied first to duties and only if there is an excess, to penalties. There was no such excess. In fact, the very reason plaintiff's surety brought suit was because it was called on to pay the deficiency owing on the reliquidated duties.

Plaintiff did not join in the *American Motorists* action or bring his own § 1581(a) suit. In fact, he failed to protest the reliquidation. Therefore, plaintiff cannot now be heard to say that the duties were not owing. Even if the goods originally were seized improperly, the court will not exercise any equitable jurisdiction which it may have to order the return of the auction proceeds. The right of the government to retain those proceeds has now been established, and the time has long passed for the imposition of such a remedy, if indeed such a remedy was ever proper.[3] If the judgment against

[2] The concept of "anomalous" jurisdiction developed in the context of district court jurisdiction over criminal matters. Since this court does not have criminal jurisdiction, it appears unlikely that Congress intended this court to have "anomalous" jurisdiction. Rather, Congress granted this court broad residual jurisdiction under 28 U.S.C. § 1581(i) (1982). Plaintiff has failed to meet his burden of demonstrating how his cause of action comes within the jurisdictional grant of § 1581(i).

[3] If plaintiff suffered damages because of improper seizure of goods for satisfaction of duties, his remedy would lie in tort. As stated in our earlier opinion, there is no waiver of sovereign immunity for such an action. *Cf. Kosak* v. *United States*. No. 82-618, 52 U.S.L.W. 4367 (U.S. March 21, 1984).

plaintiff's surety was incorrect in amount, the surety had remedies available to it. This court will not hear a collateral attack on that judgment.

Plaintiff's motion for rehearing is denied.

(Slip Op. 84-43)

BRIMSTONE EXPORT LTD. AND AGRICULTURAL AND INDUSTRIAL CHEMICALS, INC., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 83-12-01817

Before: RESTANI, *Judge.*

[Defendants' motion for reconsideration granted; Plaintiffs' motion to amend the summons denied; Preliminary injunction modified.]

(Dated April 17, 1984)

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Esq.), for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Velta A. Melnbrencis* and *J. Kevin Horgan, Esqs.,* for defendants.

Opinion and Order

RESTANI, *Judge:* Defendant moves for reconsideration of the court's order permitting plaintiff Brimstone Export Ltd. (Brimstone) to amend its summons to add Agricultural and Industrial Chemicals, Inc. (A&I) as a plaintiff in this action.

Brimstone commenced this action on December 23, 1983 by filing a summons challenging the United States Department of Commerce, International Trade Administration's (ITA) assessment of antidumping duties. Brimstone is the only plaintiff named in the summons. On January 25, 1984, Brimstone filed a motion to amend the summons to add A&I as a plaintiff.

Apparently defendant attached its opposition to Brimstone's motion to a filing in another matter. As a result of this misfiling, defendant's opposition was not before the court when it granted Brimstone's motion on February 15, 1984. Defendant now asks the court to reconsider its decision in light of defendant's contentions before the court on this motion.

Defendant brings this motion pursuant to CIT Rule 1(a). Rule 1 can serve as the basis for reconsideration of an order. *William F. Joffroy, Inc.* v. *United States,* 2 CIT 180 (1981). But, more properly, this is a Rule 60(b) motion for relief from an order on grounds of excusable neglect. Defendant's memorandum makes clear the true basis for its motion, so the citation to Rule 1 rather than Rule 60 is harmless. *See McGarr* v. *Hayford,* 52 F.R.D. 219 (1971).

Rule 60(b) permits this court to relieve defendant from an order entered into because of defendant's excusable neglect upon such

terms as are just. The court here believes that justice requires reconsideration of the order granting leave to amend. Defendant has a substantial interest in a decision as to the proper parties in an antidumping action. It cannot properly protect that interest if its contentions are not considered by this court. Defendant is substantially prejudiced by the order in question, and defendant's promptness in requesting reconsideration minimizes any prejudice to plaintiff from the delay.

As to the merits, Brimstone's motion to amend raises issues substantially similar to those considered by the court in *FirstMiss, Inc.* v. *United States,* 7 CIT —, Slip Op. 84–14 (March 6, 1984). There, as here, the named plaintiff sought to amend the summons in an antidumping case to add a related corporation as plaintiff. There, as here, defendant contended that the related corporation should not be added since it had not participated in the administrative proceedings and had not filed a timely summons. *Id.*

In *FirstMiss* the court granted leave to amend. There the original plaintiff had made no entries of the goods in dispute. All of the relevant entries at issue in the administrative proceedings, and in plaintiff's summons, were entries made by the related corporation, its subsidiary. The government knew or should have known that agents of the original plaintiff who were also agents of the subsidiary had participated in the administrative proceedings on behalf of the subsidiary. The participants had no other possible interest in the matter. So, in effect, the party sought to be added had participated in the administrative proceedings and the statutory requirement of administrative participation was satisfied. Also defendant knew or should have known that the original plaintiff was asserting its subsidiary's claims when the original plaintiff initiated litigation. Therefore defendant was not prejudiced by the adding of the subsidiary as a plaintiff after the time for filing suit had passed.

This case is distinguishable from *FirstMiss.* Here, Brimstone was the importer of record for a number of the entries in dispute in the administrative proceedings and this litigation. When Brimstone brought suit, defendant could only assume that Brimstone was putting at issue the duties assessed on entries Brimstone had made. Defendant had no way of knowing whether Brimstone intended to put at issue duties assessed on entries made by another corporation.[7]

Moreover, granting leave to amend in a case such as this could pose problems similar to those in *Matsushita Electric Industrial Co., Ltd.* v. *United States,* 2 CIT 254, 529 F.Supp. 664 (1981). In *Matsushita* the court denied leave to intervene in an antidumping case to three unions because they had participated in the administrative

[7] Even if Brimstone and A&I share some common ownership, Brimstone has not alleged sufficient indicia of an alter ego relationship with A&I. They are separate legal entities. Surely A&I would not want to be legally liable for any misconduct of Brimstone. Similarly A&I cannot establish a legal right to participate here based on conduct of Brimstone done for Brimstone's own benefit.

proceeding only as part of an umbrella organization, not in their own names. The court noted that the unions would necessarily have the same interests as the umbrella organization or each other. Thus judicial review of the administrative proceeding could be impaired if parties to the judicial action had not been completely represented before the administrative agency. *Id.* at 258.

Similarly, to allow amendment in this case would create the risk of allowing participation by parties whose interests had not been represented before the ITA. Brimstone and A&I contend that there is no possibility that A&I's interests were not fully represented before the ITA since the two companies share some common ownership. This is not persuasive. As noted above, Brimstone and A&I are separate legal entities, and each is responsible for different entries. It is possible that Brimstone may not have fully represented A&I's interests before the ITA. This contrasts sharply with the *FirstMiss* case. Amendment was permitted there because the named plaintiff had no possible interest in the matter. The agents of the named plaintiff had to be representing the interests of the party to be added since the party to be added had made all the entries at issue.

Strict statutory constraints govern bringing suit to challenge an antidumping finding. Therefore, this court will not permit amendment of a summons to add a new plaintiff outside of the statutory time limits except in cases where it is clear to all parties that the original plaintiff was bringing suit initially on behalf of the party to be added.

Therefore it is ORDERED:

Defendant's motion for reconsideration is granted. Brimstone's motion to amend the summons is denied. A&I is dismissed as a party to this action. The injunction entered into on February 17, 1984 is modified to only enjoin liquidation of entries made in the name of plaintiff Brimstone.

Decisions of th
Court of Inter

Abst

Abstracted Reappr

The following abstracts of decisions of the United
published for the information and guidance of officer
decisions are not of sufficient general interest to print
to Customs officials in easily locating cases and tracing

the United States
ernational Trade

bstracts

ppraisement Decisions

DEPARTMENT OF THE TREASURY, *April 17, 1984.*

ited States Court of International Trade at New York are
ficers of the Customs and others concerned. Although the
rint in full, the summary herein given will be of assistance
cing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATIO
R84/136	Watson, J. April 12, 1984	Compass Instrument & Optical Co.	R60/10367	Export value
R84/137	Re, C. J. April 17, 1984	GAF Corp.	74-6-01655	Export value
R84/138	Re, C. J. April 17, 1984	M. Hidary & Co.	73-6-01498	Export value
R84/139	Re, C. J. April 17, 1984	M. Hidary & Co.	73-9-02650, etc.	Export value
R84/140	Re, C. J. April 17, 1984	M. Hidary & Co.	74-2-00456, etc.	Export value
R84/141	Re, C. J. April 17, 1984	M. Hidary & Co.	75-5-01079, etc.	Export value
R84/142	Re, C. J. April 17, 1984	New York Merchandise Co.	75-8-02177	Export value
R84/143	Re, C. J. April 17, 1984	Nichimen Co.	75-5-01260, etc.	Export value

SIS OF UATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
alue	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
alue	Appraised values shown on entity papers less additions included to reflect currency revaluation	Agreed statement of facts	New York Not stated
alue	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	New York Not stated
alue	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	New York Not stated
alue	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	New York Not stated
alue	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	New York Not stated
alue	Invoiced unit prices less nondutiable charges included	C.B.S. Imports v. U.S. (C.D. 4739)	San Diego Not stated
alue	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	Chicago Not stated

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R84/144	Re, C. J.	YKK Zipper (U.S.A.) Inc.	74-5-01324, etc.	Export value
R84/145	Watson, J. April 17, 1984	Bruce Duncan Co.	R61/1449, etc.	Export value
R84/146	Watson, J. April 17, 1984	National Silver Co.	R61/4988, etc.	Export value
R84/147	Watson, J. April 17, 1984	National Silver Co.	R65/9458, etc.	Export value

S OF ATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
e	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	New York; Chicago Not stated
e	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios and accessories; entirety
e	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Flatware
e	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Flatware

Appeals To U.S. Court of Appeals For the Federal Circuit

APPEAL NO. 84-1060—*American Association of Exporters and Importers-Textile and Apparel Group* v. *The United States, et al.*—IMPORT RESTRAINTS/QUOTAS—Appeal from Slip Op. 84-21, filed April 4, 1984.

APPEAL NO. 84-1041—*Stewart Warner Corporation* v. *The United States*—SPEEDOMETERS—Appeal from Slip Op. 83-133, filed April 5, 1984.

Index

U.S. Customs Service

Customs Service Decision

U.S. GOVERNMENT PRINTING OFFICE : 1984 O - 437-360

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

POSTAGE AND FEES PAID
DEPARTMENT OF THE TREASURY (CUSTOMS)
(TREAS. 552)

CB SERIA300SDISSDUE027R 1
SERIALS PROCESSING DEPT
UNIV MICROFILMS INTL
300 N ZEEB RD
ANN ARBOR MI 48106